1-25-2016

# Tucker v. State Clerk's Record Dckt. 43922

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| TRACY TUCKER, JASON SHARP, NAOMI MORLEY, JEREMY PAYNE, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. LINDA COPPLE TROUT, DARRELL G. BOLZ, SARA B. THOMAS, WILLIAM H. WELLMAN, KIMBER RICKS, SEN. CHUCK WINDER, and REP. CHRISTY PERRY, in their official capacities as members of the Idaho State Public Defense Commission,<br><br>Defendants-Respondents | Supreme Court Case No. 43922 |

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE SAMUEL A. HOAGLAND

RICHARD EPPINK

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN
CALLY YOUNGER
DANIEL J. SKINNER

ATTORNEYS FOR RESPONDENTS

BOISE, IDAHO

| Date | Code | User | | Judge |
|---|---|---|---|---|
| 6/17/2015 | NCOC | CCGRANTR | New Case Filed - Other Claims | Richard D. Greenwood |
| | COMP | CCGRANTR | Complaint Filed | Richard D. Greenwood |
| | SMFI | CCGRANTR | (9) Summons Filed | Richard D. Greenwood |
| | MOTN | CCGRANTR | (5) Motion for Pro Hac Vice Admission | Richard D. Greenwood |
| | AFFD | CCGRANTR | Affidavit of Jeremy Payne | Richard D. Greenwood |
| | AFFD | CCGRANTR | Affidavit of Naomi Morley | Richard D. Greenwood |
| | AFFD | CCGRANTR | Affidavit of Jason Sharp | Richard D. Greenwood |
| | AFFD | CCGRANTR | Affidavit of Tracy Tucker | Richard D. Greenwood |
| | AFFD | CCGRANTR | First Affidavit of Richard Eppink | Richard D. Greenwood |
| | MOTN | CCGRANTR | Motion for Class Certification | Richard D. Greenwood |
| | AFSM | CCGRANTR | Affidavit of Jason D Williamson In Support Of Motion for Class Certification | Richard D. Greenwood |
| | AFSM | CCGRANTR | Affidavit of Kathryn M Ali In Support Of Motion for Class Certification | Richard D. Greenwood |
| | AFSM | CCGRANTR | Affidavit of Andrew C Lillie In Support Of Motion for Class Certification | Richard D. Greenwood |
| | BREF | CCGRANTR | Brief in Support of Plaintiffs' Motion for Class Certification | Richard D. Greenwood |
| 6/19/2015 | AFOS | CCBARRSA | Affidavit Of Service (06/17/15) | Richard D. Greenwood |
| | ACCP | CCWRIGRM | Acceptance Of Service (06/19/15) | Richard D. Greenwood |
| | ACCP | CCWRIGRM | Acceptance Of Service (06/19/15) | Richard D. Greenwood |
| 7/6/2015 | MODQ | CCMYERHK | Motion For Disqualification Of Judge Without Cause | Richard D. Greenwood |
| 7/8/2015 | MOTD | TCLAFFSD | Motion To Dismiss | Richard D. Greenwood |
| | MEMO | TCLAFFSD | Memorandum In Support of Motion To Dismiss | Richard D. Greenwood |
| 7/28/2015 | ORDR | TCPATAKA | Order for Disqualification of Judge Without Cause | Richard D. Greenwood |
| | CJWO | TCPATAKA | Change Assigned Judge: Disqualification W/O Cause | Melissa Moody |
| | NOTC | TCPATAKA | Notice of Reassignment | Melissa Moody |
| | ORDR | CCMEYEAR | Recusal Under 40(d)(4) | Melissa Moody |
| | CHJS | CCMEYEAR | Change Assigned Judge: Self Disqualification | Cheri C. Copsey |
| | DISF | CCMEYEAR | Disqualification Of Judge - Self | Cheri C. Copsey |
| | NOTR | CCMEYEAR | Notice Of Reassignment | Cheri C. Copsey |
| | NOTS | CCGARCOS | Notice Of Service of Discovery Requests | Cheri C. Copsey |
| 7/31/2015 | NOHG | CCBOYIDR | Notice Of Hearing | Cheri C. Copsey |
| | HRSC | CCBOYIDR | Hearing Scheduled (Motion to Dismiss 08/20/2015 02:30 PM) | Cheri C. Copsey |
| 8/3/2015 | MODQ | CCGRANTR | Motion For Disqualification of Judge Without Cause | Cheri C. Copsey |
| 8/5/2015 | ORDQ | CCMURPST | Order for Disqualification of Judge Without Cause | Cheri C. Copsey |

| Date | Code | User | | Judge |
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| 8/5/2015 | CJWO | CCMURPST | Change Assigned Judge: Disqualification W/O Cause | Samuel A. Hoagland |
| | NOTR | CCMURPST | Notice Of Reassignment - Samuel A. Hoagland | Samuel A. Hoagland |
| 8/17/2015 | HRVC | CCMASTLW | Hearing result for Motion to Dismiss scheduled on 08/20/2015 02:30 PM: Hearing Vacated | Cheri C. Copsey |
| 8/21/2015 | MOTN | CCGRANTR | Motion for Protective Order Staying Discovery Pending Decision on Motion to Dismiss | Samuel A. Hoagland |
| | MEMO | CCGRANTR | Memorandum in Support of Motion | Samuel A. Hoagland |
| 8/24/2015 | HRSC | TCHARDSL | Hearing Scheduled (Status/ADR 08/26/2015 10:00 AM) | Samuel A. Hoagland |
| | NOTC | CCGRANTR | Notice of Status Conference 8.26.15 @ 10 AM | Samuel A. Hoagland |
| 8/26/2015 | DCHH | TCHARDSL | Hearing result for Status Conference scheduled on 08/26/2015 10:00 AM: District Court Hearing Held<br>Court Reporter: Christy Olesek<br>Number of Transcript Pages for this hearing estimated: less than 100 | Samuel A. Hoagland |
| | HRSC | TCHARDSL | Hearing Scheduled (Motion For Protective Order 10/02/2015 10:00 AM) | Samuel A. Hoagland |
| | HRSC | TCHARDSL | Hearing Scheduled (Motion to Dismiss 12/16/2015 03:00 PM) | Samuel A. Hoagland |
| | MINE | TCHARDSL | Minute Entry and Scheduling Order | Samuel A. Hoagland |
| 8/31/2015 | ORDR | TCHARDSL | Order Granting Motion for Pro Hac Vice Admission (Bret H. Ladine) | Samuel A. Hoagland |
| | ORDR | TCHARDSL | Order Granting Motion for Pro Hac Vice Admission (Andrew C. Lillie) | Samuel A. Hoagland |
| | ORDR | TCHARDSL | Order Granting Motion for Pro Hac Vice Admission (Jenny Q. Shen) | Samuel A. Hoagland |
| | ORDR | TCHARDSL | Order Granting Motion for Pro Hac Vice Admission (Jason D. Willamson) | Samuel A. Hoagland |
| | ORDR | TCHARDSL | Order Granting Motion for Pro Hac Vice Admission (Kathryn M. Ali) | Samuel A. Hoagland |
| 9/3/2015 | MOTN | CCHOLDKJ | Motion for Injunction and Motion to Amend Class Action | Samuel A. Hoagland |
| 9/4/2015 | STIP | CCGRANTR | Stipulation and Motion to Amend Briefing Schedule | Samuel A. Hoagland |
| 9/11/2015 | MISC | CCGRANTR | Plaintiffs' Response to Defendants' Motion for Protective Order Staying Discovery Pending Decision on Motion to Dismiss | Samuel A. Hoagland |
| | AFFD | CCGRANTR | Second Affidavit of Richard Eppink | Samuel A. Hoagland |
| 9/16/2015 | ORDR | TCHARDSL | Order Denying Motion for Injunction and Motion to Amend Class Action | Samuel A. Hoagland |
| 9/18/2015 | RPLY | CCVIDASL | Reply Memorandum in Support of Defendants Motion for Protective Order Staying Discovery Pending Decision on Motion to Dismiss | Samuel A. Hoagland |

| Date | Code | User | | Judge |
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| 9/21/2015 | MOTN | CCMARTJD | Motion to Appear by Telephone | Samuel A. Hoagland |
| | MOTN | CCMYERHK | (Unopposed) Motion For Pro Hac Vice Admission | Samuel A. Hoagland |
| 9/23/2015 | CONT | TCHARDSL | Continued (Motion For Protective Order 10/16/2015 10:00 AM) | Samuel A. Hoagland |
| | ORDR | TCHARDSL | Order Granting Stipulation and Motion to Amend Briefing Schedule | Samuel A. Hoagland |
| | NOTC | TCHARDSL | Notice of Hearing (10/16/2015 @ 10 AM) | Samuel A. Hoagland |
| 9/29/2015 | ORDR | TCHARDSL | Order Granting (Unopposed) Motion for Pro Hac Vice Admission | Samuel A. Hoagland |
| | ORDR | TCHARDSL | Order Granting Motion to Appear by Telephone | Samuel A. Hoagland |
| 10/8/2015 | NOTC | CCGARCOS | Notice of Substitution of Counsel (David W. Cantrill for William H. Wellman and Sara B. Thomas) | Samuel A. Hoagland |
| 10/16/2015 | DCHH | TCPATAKA | Hearing result for Motion For Protective Order scheduled on 10/16/2015 10:00 AM: District Court Hearing Held<br>Court Reporter: Christy Olesek<br>Number of Transcript Pages for this hearing estimated: less than 50 pages | Samuel A. Hoagland |
| 10/20/2015 | ORDR | TCHARDSL | Order Governing Discovery | Samuel A. Hoagland |
| 11/10/2015 | NOTS | TCLAFFSD | Notice Of Service | Samuel A. Hoagland |
| 11/12/2015 | NOSV | CCBARRSA | Notice Of Service | Samuel A. Hoagland |
| 11/23/2015 | RSPN | CCBOYIDR | Plaintiff's Response to Defendants Motion to Dismiss Filed July 8, 2015 | Samuel A. Hoagland |
| | AFFD | CCBOYIDR | Affidavit of Ian Thomson | Samuel A. Hoagland |
| | AFFD | CCBOYIDR | Second Affidavit of Richard Eppink | Samuel A. Hoagland |
| 11/24/2015 | MISC | CCLOWEAD | Errata (Plaintiffs' Response to Defendants' Motion to Dismiss) | Samuel A. Hoagland |
| | RSPN | CCLOWEAD | Plaintiff's Response to Defendants' Motion to Dismiss filed July 8, 2015 | Samuel A. Hoagland |
| 12/4/2015 | MEMO | CCTAYLSA | Reply Memorandum in Support of Defendants Motion to Dismiss | Samuel A. Hoagland |
| | OBJT | CCTAYLSA | Defendants Objection and Motion to Strike Notice of Hearing (12/16/15 @ 3pm) | Samuel A. Hoagland |
| | HRSC | CCTAYLSA | Hearing Scheduled (Motion to Dismiss 12/16/2015 03:00 PM) | Samuel A. Hoagland |
| 12/9/2015 | RSPS | TCLAFFSD | Response To Defendants' Objection And Motion To Strike Filed December 4, 2015 | Samuel A. Hoagland |
| 12/11/2015 | NOTC | CCMARTJD | Notice of Substitution of Counsel (Skinner for Cantrill) | Samuel A. Hoagland |
| 12/14/2015 | REPL | CCZUBEDK | Reply In Support of Defendants Objection and Motion to Strike | Samuel A. Hoagland |
| 12/15/2015 | NOTC | CCLOWEAD | Notice of Telephonic Appearance | Samuel A. Hoagland |

| Date | Code | User | | Judge |
|---|---|---|---|---|
| 12/16/2015 | DCHH | DCELLISJ | Hearing result for Motion to Dismiss scheduled on 12/16/2015 03:00 PM: District Court Hearing Held<br>Court Reporter: Christy Olesek<br>Number of Transcript Pages for this hearing estimated: Less than 200 pages | Samuel A. Hoagland |
| 1/20/2016 | MEMO | TCHARDSL | Memorandum Decision and Order Granting Motion to Dismiss | Samuel A. Hoagland |
| 1/21/2016 | JDMT | DCABBOSM | Judgment | Samuel A. Hoagland |
| | CDIS | DCABBOSM | Civil Disposition entered for: Bolz, Darrell G, Defendant; C L Butch Otter, Defendant; Huskey, Molly Hon, Defendant; Perry, Christy Rep, Defendant; Ricks, Kimber, Defendant; State Of Idaho, Defendant; Thomas, Sara B, Defendant; Wellman, William H, Defendant; Winder, Chuck Sen, Defendant; Morley, Naomi, Plaintiff; Payne, Jeremy, Plaintiff; Sharp, Jason, Plaintiff; Tucker, Tracy, Plaintiff. Filing date: 1/21/2016 | Samuel A. Hoagland |
| | STAT | DCABBOSM | STATUS CHANGED: Closed | Samuel A. Hoagland |
| 1/25/2016 | NOTA | CCBARRSA | NOTICE OF APPEAL | Samuel A. Hoagland |
| | APSC | CCBARRSA | Appealed To The Supreme Court | Samuel A. Hoagland |
| 3/22/2016 | NOTC | TCWEGEKE | Notice of Transcript Lodged - Supreme Court No. 43922 | Samuel A. Hoagland |

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, JASON SHARP, NAOMI MORLEY, and JEREMY PAYNE, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho;

Case No. CV OC 1510240

**CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

HON. MOLLY HUSKEY, in her official capacity as a member of the Idaho State Public Defense Commission; DARRELL G. BOLZ, in his official capacity as a member of the Idaho State Public Defense Commission; SARA B. THOMAS, in her official capacity as a member of the Idaho State Public Defense Commission; WILLIAM H. WELLMAN, in his official capacity as a member of the Idaho State Public Defense Commission; KIMBER RICKS, in his official capacity as a member of the Idaho State Public Defense Commission; SEN. CHUCK WINDER, in his official capacity as a member of the Idaho State Public Defense Commission; and REP. CHRISTY PERRY, in her official capacity as a member of the Idaho State Public Defense Commission,

Defendants.

## INTRODUCTION

1. More than five years ago, the State of Idaho asked the National Legal Aid and Defender Association ("NLADA") for a report on its public-defense system. That report found, unequivocally, that "none of the public defender systems in the sample counties are constitutionally adequate." Specifically, the report identified a number of specific areas of concern with respect to trial-level indigent-defense delivery in Idaho. These include the widespread use of fixed-fee contracts; extraordinarily high attorney caseloads and workloads; lack of consistent, effective, and confidential communication with indigent clients; inadequate, and often nonexistent, investigation of cases; lack of structural safeguards to protect the independence of defenders; lack of adequate representation of children in juvenile and criminal court; lack of sufficient supervision; lack of performance-based standards; lack of ongoing training and professional development; and lack of any meaningful funding from the State.

2. Five years later, the State has failed to fix this unconstitutional system. The Governor's Commission passed the buck by recommending that the Legislature create a special study committee. That legislative committee then passed the buck by establishing yet another commission to make recommendations to the legislature. In January 2015, the Governor acknowledged in his State of the State address that "the courts have made it clear that our current method of providing legal counsel for indigent criminal defendants does not pass constitutional muster." Astoundingly, the State failed yet again in the recently concluded 2015 legislative session to fund or improve its public-defense system. Because the executive and legislative branches refuse to take the necessary actions to fix Idaho's public-defense system, it falls on this Court to ensure that "[c]onstitutional rights, as well as this Court's duty to faithfully interpret our constitution and the federal constitution, do not wane before united efforts of the legislature and the governor."[1]

3. Plaintiffs Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne bring this civil-rights class-action lawsuit pursuant to 42 U.S.C. § 1983 on behalf of themselves and all those similarly situated. They seek declaratory and injunctive relief for defendants haled before state courts throughout Idaho from the ongoing injuries and harm caused by the continuing failure of Defendants (the "State") to provide effective legal representation to indigent criminal defendants across the State of Idaho, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, of Article 1, Section 13, of the Idaho Constitution, and Idaho statutes and regulations.

4. Plaintiff Tracy Tucker was arrested in Bonner County on March 6, 2015, after being charged with attempted strangulation and domestic battery in the presence of a child. Although

[1] *Miles v. Idaho Power Co.*, 116 Idaho 635, 640 (1989).

he was assigned a public defender, Mr. Tucker was not represented by counsel at his initial appearance, during which the court set his bail at $40,000. Without the guiding hand of counsel at that initial proceeding, Mr. Tucker was unable to make any arguments to the court to justify a reduction in the bail amount. Since Mr. Tucker could not afford to post bail, he remained in the Bonner County Jail for the next three months. During his time in custody, Mr. Tucker met with his attorney just three times, for a total of approximately 20 minutes. Two of those "meetings" occurred in court, during Mr. Tucker's subsequent court appearances. In addition, during his three months in jail, Mr. Tucker attempted, unsuccessfully, to reach his attorney by phone more than 50 times. As of 10 days prior to Mr. Tucker's trial date, his attorney's demanding schedule had prevented him from conducting any meaningful investigation into Mr. Tucker's case, reviewing and explaining to Mr. Tucker the relevant discovery materials, or discussing trial strategy with Mr. Tucker. On June 2, 2015, Mr. Tucker pleaded guilty to attempted strangulation, at which time he was released from jail. Mr. Tucker is scheduled to be sentenced on August 3, 2015, and faces up to 15 years in prison.

5. Plaintiff Jason Sharp was arrested in Shoshone County on May 16, 2014, pursuant to a warrant charging him with burglary and grand theft. Although he was assigned a public defender, Mr. Sharp was not represented by counsel at his initial appearance on May 20, 2014, during which the court set his bail at $50,000. Mr. Sharp was unable to make the necessary arguments to the court to justify a reduction in the bail amount at that initial proceeding. Since Mr. Sharp could not afford to post bail, he remained in the Shoshone County Jail for approximately two weeks. Without the help of his lawyer, Mr. Sharp was subsequently able to convince the court that his bail amount was inappropriate because it was based on the erroneous belief that he was on probation at the time of his arrest. The court eventually agreed and reduced

his bond to $5,000. Unfortunately, Mr. Sharp was still unable to afford to pay his bail. Fearing that he would lose his job if he remained in jail, Mr. Sharp contacted his employer, who agreed to write a letter to the court vouching for Mr. Sharp and recommending his release. The court released Mr. Sharp from custody after receiving the letter of support from his employer. Over the course of the last year since his release, however, Mr. Sharp has been unable to communicate effectively with his attorney regarding the status of his case. For instance, despite repeated requests from Mr. Sharp, his attorney has not yet provided him with a copy of the discovery materials in his case, leaving Mr. Sharp unclear about what evidence the State does or does not have against him, and making it impossible for Mr. Sharp to participate meaningfully in the development of his defense. Moreover, aside from several motions to continue his jury trial, Mr. Sharp's attorney has not filed any substantive motions on his behalf. Even the court's decision to reduce Mr. Sharp's bond to $5,000, and ultimately to release him on his own recognizance, was the result of Mr. Sharp's own advocacy in court and his employer's willingness to support him, rather than a response to any motion filed by his attorney. Mr. Sharp is scheduled to go to trial on July 14, 2015, and faces up to 30 years in prison if convicted on both counts.

6. Plaintiff Naomi Morley was arrested in Ada County on March 14, 2014, following a serious single-car accident in which she was severely injured. Ms. Morley, who was 56 years old at the time of her arrest, was charged with driving under the influence and possession of a controlled substance after officers purportedly discovered prescription medication and drug paraphernalia. Although an Ada County public defender was present during Ms. Morley's initial appearance by video, Ms. Morley did not have an opportunity to speak with that lawyer and, ultimately, the Ada County Public Defender's office determined that it had a conflict of interest in representing Ms. Morley. The Court set Ms. Morley's bail at $15,000 at her initial

appearance. Since she could not afford bail, Ms. Morley remained in the Ada County Jail until her bail was reduced three weeks later, notwithstanding the recent serious injuries she had sustained. Since then, Ms. Morley's attorneys have been unable to provide her with adequate representation. For instance, Ms. Morley was told that if she wanted to retain an expert to challenge the State's contentions regarding the alleged presence of drugs in her system at the time of the accident, and/or to do any outside testing to challenge the prosecution's allegations, she would have to pay for such services herself. Also, despite informing her lawyer that another person would confess responsibility, it was only through Ms. Morley's own efforts that she recently obtained a sworn affidavit from the person acknowledging responsibility. On information and belief, Ms. Morley's lawyer's caseload has been so large, and his resources so few, that he has been unable to review Ms. Morley's extensive comments on the police reports in her case or to investigate the vehicle involved in the accident before the state scrapped it, destroying that evidence. Further, Ms. Morley has been unable to communicate effectively or consistently with her attorney, and is concerned that her attorney is pressuring her to plead guilty because he does not have the time or resources to prepare sufficiently for trial. Most recently, Ms. Morley turned down a plea offer that would have required her to spend 10 years in prison. She is scheduled to go to trial on June 29, 2015, and faces over 15 years in prison if convicted on all counts.

7. Plaintiff Jeremy Payne was incarcerated at the Payette County Jail on January 25, 2015, after being arrested for possession of a controlled substance and drug paraphernalia. Although Mr. Payne was assigned a public defender, he was not represented by counsel at his initial appearance, during which the court set his bail at $30,000. Since he was not able to afford bail, Mr. Payne remained in jail pending resolution of his case. Mr. Payne was released from Payette

County Jail on June 9, 2015, after the State failed to take the case to trial in a timely fashion. Unfortunately, during the five months he was in custody, Mr. Payne was unable to communicate with his attorney on a consistent basis. In light of the many other felony cases assigned to his attorney, Mr. Payne only met with counsel twice at the County Jail, both for very short periods of time. Aside from those brief meetings, Mr. Payne has only met with his attorney in court—for even shorter periods of time—just prior to his court appearances, and has been unable to contact his attorney by phone despite repeated attempts. Indeed, Mr. Payne has spent a total of approximately 30–45 minutes with his attorney since the inception of his case. Moreover, to date, Mr. Payne's attorney has been unable to conduct any meaningful investigation into his case, review the relevant discovery with his client, or share with Mr. Payne his thoughts with regard to trial strategy and related matters. Mr. Payne's preliminary hearing was waived and his trial has now been continued three times. Mr. Payne is now scheduled to go to trial on July 21, 2015, and faces up to seven years in prison if convicted.

8. Sadly, the circumstances surrounding the named Plaintiffs' representations are not unique to them. Rather, they exemplify the experiences of thousands of indigent defendants across the State, who have been denied their right to effective counsel as a result of the State's failure to provide the necessary resources, robust oversight, and specialized training required to ensure that all public defenders can handle all of their cases effectively and in compliance with state and federal law.

9. Despite amendments to Idaho's public-defender statutes that were passed in 2014 through a bill enacted as the "Idaho Public Defense Act," the current, patchwork public-defense arrangement in Idaho remains riddled with constitutional deficiencies and fails, at all stages of the prosecution and adjudication processes, to ensure adequate representation for indigent

defendants in both criminal and juvenile proceedings in Idaho. Although the State has been keenly aware of this failure to provide for the basic rights of indigent criminal defendants for years, without a guiding state-wide scheme, the majority of Idaho counties have failed to implement standards and requirements that satisfy either statutory or constitutional mandates. This has created a flawed system that forces many inexperienced and inadequately trained attorneys to juggle too many cases without enough resources. The result is constitutionally deficient representation of indigent defendants across the state.

10. Certainly, if public-defense attorneys in Idaho had their way, they would be well equipped with the resources and training necessary to do their jobs effectively at all stages of the proceedings against their clients. But, due to the State's pervasive and persistent constitutional and statutory failures—including, but not limited to, the State's failure to provide adequate funding or relevant state-wide directives—public defenders are not able to provide the zealous representation constitutionally required of them in all of their cases.

11. Indigent defendants in most Idaho counties, including the named Plaintiffs, are not represented by counsel at their initial appearances, during which a number of critical events often occur, including bail determinations, setting of pretrial release conditions, waivers of rights, entry of pleas, sentencing, and off-the-record discussions between the prosecutor and the defendant—and sometimes the presiding judge—regarding the defendant's case.

12. Because public defenders in most instances do not have the staff or resources to be present at initial appearances, indigent defendants are most often left to fend for themselves during these critical proceedings, without the assistance of counsel. Counsel at this stage is especially important to, among other things, presenting reasoned legal arguments to reduce bail (including, but not limited to, arguments related to the strength of the State's case, as well as the

defendant's income, ability to pay, and ties to the community), advising their clients about how to plead, and negotiating with prosecutors regarding potential plea agreements and pretrial-release terms. Further, the absence of counsel at initial appearances causes or contributes to the unnecessary detention of indigent defendants—sometimes for extended periods of time—who may otherwise have been released while they await resolution of their cases; limited ability of indigent defendants to interact with their lawyers, provide and review case materials, and assist in the evaluation of their cases and preparation of their defenses; significant impact to indigent defendants' work and family lives; insincere, uninformed, or uneducated pleas entered, partly or entirely, in order to obtain immediate release; and other adverse impacts, many times with lifelong consequences.

13. Even after counsel has been appointed, indigent defendants in many counties, including defendants not in custody, lack sufficient access to the public defenders assigned to their cases. For example, defendants frequently do not have the opportunity to meet with their public defenders for purposes of receiving and reviewing the discovery materials related to their cases. Under such conditions, it is nearly impossible for defendants to assist in their own defenses or to understand and remain abreast of developments in their own cases.

14. Moreover, in many Idaho counties, there are disincentives for public defenders to engage experts or investigators because such costs may not be covered by public-defender contracts. Accordingly, public defenders routinely forgo the use of investigators and experts to carry out basic tasks, such as identifying and interviewing witnesses, and reviewing and analyzing evidence. In most instances, defense counsel must request additional resources from the court to hire an investigator or an expert, and, upon information and belief, such requests are rarely made,

in part because some public defenders believe that the available resources are so limited that the requests should be reserved only for extraordinary situations.

15. These disincentives are caused, in large part, by the fixed-fee contract structure used in a number of Idaho counties, under which contracting attorneys are paid a flat fee in exchange for their representation of indigent defendants, irrespective of the number of clients the attorney may be assigned during the term of the contract, or the nature of those clients' criminal charges. A recent county-by-county survey revealed that at least 19 Idaho counties continue to use a fixed-fee contract system to secure legal representation for indigent defendants, even though the Idaho Code expressly prohibits it. Such a system creates significant conflicts of interest by creating powerful incentives for the contracting attorney to spend as little time and money as possible on any given case—to the obvious detriment of indigent clients.

16. In addition, public-defender caseloads in counties across the state are significantly higher than the national standards, making it difficult, if not impossible, for attorneys to provide their clients with the zealous representation to which they are entitled. According to a December 2014 analysis conducted by Idaho's Legislative Services Office ("LSO"), in at least six Idaho counties, individual public defenders are responsible for handling more than twice the work that one attorney should ever take on. Individual public defenders in an additional 19 Idaho counties are responsible for handling the work of more than one attorney (but fewer than two).[2]

17. On information and belief, the current caseloads carried by public defenders in most Idaho counties are only slightly better, if not worse, than those highlighted in the National Legal Aid and Defender Association 2010 report ("NLADA Report") on Idaho's public-defense system. For instance, in Kootenai County, identified in the NLADA Report as one of the few

[2] Idaho Legislative Services Office - Report on 2013 Caseloads, *available at* http://legislature.idaho.gov/sessioninfo/2014/interim/pdef1028_lso.pdf.

bright spots with respect to public-defense services in Idaho, public defenders continue to work under crushing caseloads. In 2014, four of the office's 15 attorneys handled well over 400 cases each, the bulk of which were felonies and misdemeanors. Another four defenders handled over 300 cases in 2014, including a mixture of felonies, misdemeanors, juvenile cases, and other proceedings for which the Public Defender's Office is responsible. Such caseloads are well above national standards and impossible for one person to handle effectively.

18. The issues associated with the overwhelming caseloads of Idaho public defenders are made worse by the fact that at least 26 Idaho counties permit contract public defenders to maintain a private practice, often without tracking the number of private cases being handled by the contracting attorney at any given time. Most of those counties (22 of them) also rely on fixed-fee contracts. This creates an even greater economic incentive for public defenders to deprioritize their indigent clients in favor of their paying clients.

19. Further, many Idaho counties do not have the resources or expertise to provide the kind of specialized training or supervision to ensure that representation of indigent defendants is consistent with the State's constitutional mandates. According to a recent state-wide assessment by the Idaho State Public Defense Commission ("PDC"), "a significant number of indigent defense attorneys in the State are not receiving adequate training hours in areas directly relevant to the representation of their indigent clients."[3]

20. These deficiencies are further exacerbated by the lack of true independence afforded to public defenders across the state. Under the current supervisory structure, public defenders report to their respective county commissioners, many of whom are not attorneys or are otherwise unqualified to oversee a legal practice—let alone one requiring specialized knowledge

[3] Idaho State Public Defense Commission, 2015 Report to the Legislature, 9.

of criminal law. For example, in Bonner County, the commissioners hold degrees in History/Business Systems Management, Aeronautics, and Education, respectively. None has any formal legal training or practice experience. The same is true in Bingham County, where it appears that only two of the three commissioners attended college, and none has a background in the law. Yet in some counties, commissioners have extensive authority related to criminal-law matters, including the authority to approve or reject requests for additional resources, and to terminate or choose not to renew the public defender's contract, leaving the defenders beholden to the often-uninformed whims of their supervisors.

21. All of these deficiencies have combined to create a constitutional crisis with respect to indigent defense delivery in Idaho—a crisis that federal and state law require the State to address in a meaningful, expedient, and substantive way.

## BACKGROUND

22. The State of Idaho has a long history of recognizing the right to counsel for those criminal defendants who are unable to afford an attorney. As early as 1864, Idaho law required that a defendant "be informed by the court that it is his right to have counsel before being arraigned," and that he "be asked if he desires the aid of counsel."[4]

23. In 1887, the Idaho legislature went a step further, passing a law requiring trial courts to advise defendants of the right to counsel during arraignments on criminal charges, and to appoint counsel if the defendant requested an attorney but was unable to afford one.[5]

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[4] Cr. Prac. 1864 § 267.

[5] *See* R.S., R.C., & C.L. § 7721 (1887); I.C. § 19-1512 (1967).

24. Once the appointment was made, defense counsel were to "be paid out of the county treasury, upon order of the judge of the court, such sum as the court may deem reasonable for the services rendered."[6]

25. Following achievement of statehood in 1890, Idaho lawmakers included the right to counsel in the state constitution. Specifically, Article 1, Section 13 of the Idaho Constitution states that criminal defendants have a right to "appear and defend in person and with counsel."

26. Since then, the Idaho judiciary has consistently interpreted this constitutional provision, as well as related statutes, as requiring the provision of counsel to indigent defendants at public expense.[7]

27. By the time the United States Supreme Court decided *Gideon v. Wainwright*[8] in 1963, some 37 states—including Idaho—had already committed to providing counsel for indigent defendants, upon request, in all felony cases. Indeed, then-Idaho Attorney General Frank Benson was one of 22 attorneys general to sign on to an amicus brief submitted to the U.S. Supreme Court in support of the plaintiff's claims in *Gideon.*

28. After *Gideon*, the U.S. Supreme Court continued to expand the right to counsel in significant ways. The Court has extended the right to counsel to children in juvenile-delinquency proceedings, *see In re Gault*;[9] probationers in probation revocation proceedings, *see Mempa v. Rhay*;[10] and indigent defendants charged with misdemeanors, *see Argersinger v.*

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[6] I.C. § 19-1513 (Repealed).

[7] *See State v. Montroy*, 217 P. 611, 614 (1923)

[8] 372 U.S. 335 (1963).

[9] 387 U.S. 1 (1967).

[10] 389 U.S. 128 (1967).

*Hamlin*.[11] More recently, the Court found that the right to counsel attaches for all defendants at their initial appearances, *see Rothgery v. Gillespie County, Tex.*;[12] and that plea bargaining constitutes a "critical stage" of any criminal proceeding, thereby requiring the effective assistance of counsel in connection with plea negotiations, *see Lafler v. Cooper*[13] and *Missouri v. Frye*.[14]

29. Idaho, on the other hand, has taken several steps backward in the half-century since *Gideon*. Rather than making good on its early efforts and serving as a model for other states to follow, the State of Idaho has failed to ensure—through lack of sufficient oversight, training, and funding—that people accused of crimes within its borders who are unable to afford an attorney are provided with constitutionally adequate legal assistance. As a result, Idaho has become the epitome of an indigent-defense system in crisis, notwithstanding the 2014 amendments to the public-defense statutes, which have done very little to address the underlying causes of the State's indigent-defense problem.

***National Legal Aid and Defender Association Analysis of Idaho's Indigent-Defense Services***

30. In its 2007 management audit of Idaho's State Appellate Public Defender, the National Legal Aid and Defender Association ("NLADA") concluded that the caseload problems plaguing Idaho's appellate public defenders at that time could likely be addressed by improving trial-level indigent defense services across the state.

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[11] 407 U.S. 25 (1972).

[12] 554 U.S. 191 (2008).

[13] 132 S. Ct. 1376 (2012).

[14] 132 S. Ct. 1399 (2012).

31. Following the release of the audit, the Idaho Criminal Justice Commission ("CJC")—created by Executive Order in 2005—and composed primarily of various State officials involved in the criminal-justice system—authorized the NLADA to conduct a comprehensive study of the State's trial-level indigent-defense system.

32. In January 2010, the NLADA released its evaluation of trial-level indigent-defense services in Idaho ("NLADA Report"). The Report included an assessment of services being provided to both adults and children in the criminal justice system, and focused specifically on seven counties.[15]

33. The NLADA's assessment was rooted in the American Bar Association's *Ten Principles of a Public Defense Delivery System*, promulgated in February 2002. According to the ABA, the *Ten Principles* are an interdependent set of standards that "constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation" to indigent defendants.[16]

34. The NLADA found that, for thousands of defendants across Idaho, the constitutional requirements of *Gideon* and its progeny have been left unfulfilled, and the standards set forth in the ABA's *Ten Principles* have gone largely unmet.[17]

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[15] The counties highlighted in the NLADA Report are Ada, Blaine, Bonneville, Canyon, Kootenai, Nez Perce, and Power Counties.

[16] ABA Ten Principles of a Public Defense Delivery System (Feb. 2002), at Introduction, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

[17] NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE GUARANTEE OF COUNSEL: ADVOCACY & DUE PROCESS IN IDAHO'S TRIAL COURTS: EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN IDAHO 2–3 (2010).

35. The NLADA Report further asserts that, in direct contravention of the *Ten Principles*, the State has failed to ensure adequate training and supervision for public defenders, making it nearly impossible to assess whether public defenders are meeting the standards established by *Gideon* and its progeny.[18]

36. The State has foisted this essential function on each of its 44 counties without providing any monetary or supervisory support to the counties for trial-level public defense, aside from the limited funds allocated by the Public Defense Commission in 2014 to create additional, non-mandatory training opportunities for individual defenders who choose to take advantage of them. As the NLADA found, "[b]y delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight, Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qualifies for services and in the level of competency of the services rendered."[19] The 2014 amendments to the public-defense statutes failed to remedy this deficiency.

37. The NLADA identified a number of specific areas of concern with respect to trial-level indigent-defense services delivery in Idaho, many of which are still of concern today. These include the widespread use of fixed-fee contracts; extraordinarily high attorney caseloads and workloads; inadequate, and often nonexistent, investigation of cases; lack of structural safeguards to protect the independence of defenders; lack of adequate representation of children in juvenile and criminal court; lack of sufficient supervision; lack of performance-based

[18] *Id.* at 67–73.

[19] *Id.* at 2.

standards; lack of ongoing training and professional development; and lack of any meaningful funding from the State.[20]

***Recent Amendments to Idaho's Public-Defense Statutes***

38. In March 2014, despite several years of research and study by the Idaho Criminal Justice Commission and a legislative study committee, and in recognition of the need for reform, Idaho enacted only meager amendments to its public-defense statutes, found mainly at sections 19-848 through 19-866 of the Idaho Code.

39. The 2014 amendments (1) establish a public-defense commission, along with its powers and duties;[21] (2) clarify the duties of law-enforcement officers and/or the courts to notify criminal defendants of their right to counsel;[22] (3) identify the various methods by which counties are permitted to provide indigent-defense services;[23] and (4) encourage parity in compensation between public defenders and county prosecutors.[24]

40. Under the amended statutes, counties may provide indigent-defense services by either (1) establishing and maintaining an office of public defender; (2) joining with the board of county commissioners of one or more counties within the same judicial district to establish and maintain a joint office of public defender; (3) contracting with an existing office of public defender; or (4) contracting with a defending attorney, provided that the terms of the contract do not include any

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[20] *Id.* at iii-viii; 3–9.

[21] I.C. §§ 19-849 (2014) and 19-850 (2014).

[22] I.C. § 19-853 (2014).

[23] I.C. § 19-859 (2014).

[24] I.C. § 19-860 (2014).

pricing structures that charge or pay a single fixed fee for the services and expenses of the attorney.[25]

41. Of Idaho's 44 counties, seven have established an office of public defender,[26] while just two have partnered to form a joint office of public defender.[27] One county neither maintains a public-defender office nor a contract for the provision of indigent-defense services, choosing instead to have the court appoint attorneys on an ad hoc basis, even though the 2014 amendments eliminated such a system from the list of acceptable options.[28] The remaining 34 counties provide indigent-defense services pursuant to a contractual agreement with a defending attorney or law firm, 19 of which operate under fixed-fee contracts.[29]

42. Under the amended statutes, a county must "annually appropriate enough money to administer the program of representation that it has elected under section 19-859, Idaho Code[,]" but the State is still not required to contribute any funding toward the provision of trial-level indigent-defense services.[30]

43. The PDC, established in 2014, is responsible for promulgating rules related to training and data-reporting requirements for defense attorneys across the state.[31]

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[25] *See* I.C. § 19-859 (1)–(4).

[26] These are Ada, Bannock, Bonner, Bonneville, Canyon, Kootenai, and Twin Falls Counties.

[27] These are Minidoka and Cassia Counties.

[28] This is Washington County.

[29] *See* Idaho State Public Defense Commission, 2015 Report to the Legislature, 5–7.

[30] I.C. § 19-862(1) (2014).

[31] I.C. § 19-850(1)(b).

44. The PDC is further responsible for making recommendations to the Idaho legislature, including an initial round of recommendations that was due by January 20, 2015, regarding a number of issues, including core requirements for indigent-defense contracts, qualifications and experience standards for defending attorneys, enforcement mechanisms, and funding.[32] Yet, as of the date of this Complaint, the PDC has failed to make any such recommendations.

45. Despite the State's acknowledgement that significant reform is necessary in this arena—by, among other things, the creation of various virtually powerless committees, including the establishment in 2010 of a public-defense subcommittee of the Criminal Justice Commission, the establishment in 2013 of a special committee of the legislature to recommend legislative reforms to the public-defense system, and the 2014 statutory amendments and formation of the PDC—the State has done little to meaningfully address the myriad problems plaguing Idaho's indigent-defense system.

46. Critically, the State still does not provide any funding or supervision to any of the counties with respect to the delivery of indigent-defense services at the trial level.

47. Each county is still currently responsible for providing indigent-defense services to all criminal defendants within the county who are charged with misdemeanor or felony offenses and who are unable to afford an attorney. Yet, counties must do so without any meaningful funding, oversight, or training from the State.

48. Despite the PDC's responsibility to promulgate rules related to training and data-reporting requirements for defense attorneys across the state, no such rules have been promulgated to date.

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[32] *Id.*

49. Despite the PDC's responsibility to make recommendations to the Idaho legislature regarding the core requirements for indigent-defense contracts, qualifications, and experience standards for defense attorneys, enforcement mechanisms, and funding, no such recommendations have been made to date.

50. Moreover, even if the PDC had promulgated certain rules or made specific recommendations, it has no authority to reprimand or sanction counties or individuals that do not abide by such rules or recommendations.

51. For instance, upon information and belief, at least 19 of the 34 Idaho counties that use a contract system currently operate under a fixed-fee pricing structure, despite express statutory prohibition against such contracts.

***Defendants' Ongoing Failure to Provide Indigent Defendants with Constitutionally Adequate Legal Representation***

52. In addition to the State's failure to meet the minimal requirements of the public-defense statutes, it has also failed to sufficiently address the many state and federal constitutional issues identified in the NLADA Report.

53. According to a recent study conducted by the Pre-Trial Justice subcommittee of the Criminal Justice Commission, only five of Idaho's 44 counties provide counsel to indigent defendants at their initial appearance before a judicial officer, in violation of Idaho law. Only one of the named Plaintiffs had counsel present at her initial appearance—and that counsel ultimately had a conflict of interest preventing counsel from representing her.

54. As a result of the State's failure to create and enforce a constitutionally consistent scheme that ensures representation for indigent defendants at initial appearances, many defendants, including the named Plaintiffs, are unable to effectively seek bond reduction or release from custody. As such, many defendants unnecessarily spend prolonged periods of time in pretrial

detention or feel coerced to plead guilty to charges against which they have a valid and potentially effective defense, merely to get out of jail and avoid losing a job or meaningful contact with their children and families.

55. Public-defender caseloads in counties across the state continue to exceed national standards, in some cases by more than double.[33]

56. As a result of their crushing caseloads and lack of support, Idaho public defenders do not have the time or resources to communicate with all of their clients consistently and effectively.

57. The State's failure to commit sufficient resources to indigent defense has also made it impossible for public defenders to investigate and otherwise prepare all of their cases thoroughly and effectively.

58. Moreover, the State does not provide public defenders with the specialized training and ongoing supervision necessary to ensure zealous and effective representation for indigent defendants.

59. In failing to remedy these deficiencies, the State has caused harm to the Plaintiffs, and those similarly situated, by constructively denying them their Sixth Amendment right to competent counsel and their Fourteenth Amendment right to due process.[34]

60. Pursuant to federal and state law, Plaintiffs, on behalf of themselves and a class of similarly situated individuals, seek declaratory and injunctive relief against Defendants to

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[33] Idaho Legislative Services Office - Report on 2013 Caseloads, *available at* http://legislature.idaho.gov/sessioninfo/2014/interim/pdef1028_lso.pdf.

[34] *See United States v. Cronic*, 466 U.S. 648, 659 (1984).

remedy the rampant denial of constitutional rights to which Idaho's indigent defendants are subjected on a daily basis.[35]

## JURISDICTION & VENUE

61. This Court maintains original, subject-matter jurisdiction over this action under Section 1-705 of the Idaho Code.

62. Venue is proper in this Court pursuant to Section 5-402 of the Idaho Code because the State of Idaho is named as a defendant in this action, and Ada County encompasses the capital city of Boise. Additionally, the decisions that have caused the failures of Idaho's indigent-defense system were made in Ada County.

## PARTIES

### A. Plaintiffs

*Tracy Tucker*

63. Plaintiff TRACY DON TUCKER is and at all times pertinent herein has been a resident of Sandpoint, Idaho. Mr. Tucker was taken into custody on March 6, 2015, after he was charged with attempted strangulation and domestic battery in the presence of a child, exposing him to over 15 years in prison. Mr. Tucker was not represented by counsel at his initial appearance, during which the court set his bail at $40,000. Mr. Tucker could not afford to post bail, and as a result, he remained in Bonner County Jail until June 2, 2015.

[35] Through this Complaint, Plaintiffs do not, at this time, challenge the components of Idaho's indigent-defense system served by the State Appellate Public Defender (*see* Sections 19-867 through 19-872 of the Idaho Code), which pertain primarily to felony criminal cases on appeal. Rather, this Complaint is focused on the State's failure to provide an adequate criminal-justice system for indigent defendants represented by overloaded and under-resourced defense attorneys at the trial level, and in misdemeanor and other appeals not handled by the State Appellate Public Defender.

64. Bonner County relies on contract attorneys, who are paid an annual fixed fee, to represent indigent criminal defendants being prosecuted within its jurisdiction.

65. Although Mr. Tucker was assigned a public defender prior to his next court appearance, his attorney did not appear on his behalf at his arraignment on March 18, 2015. Instead, his public defender sent a substitute attorney who had no prior knowledge of Mr. Tucker's case or even of the charges that Mr. Tucker faced. On information and belief, the substitute attorney failed to seek a bond reduction or otherwise advocate on Mr. Tucker's behalf.

66. Given the demands of his caseload, Mr. Tucker's attorney has met Mr. Tucker only on three occasions: once when his attorney came to Bonner County Jail and met with Mr. Tucker for approximately 10 minutes, and two additional times when he saw him in court. Mr. Tucker's attorney did not meet with him prior to either of those court proceedings—not even in the courtroom prior to the proceedings. Mr. Tucker has spoken with his public defender on the phone only on two occasions, both for approximately five minutes. Generally speaking, Mr. Tucker has also been unable to contact his attorney by phone. Between March 18, 2015, and June 1, 2015, Mr. Tucker attempted—unsuccessfully—to reach his attorney by phone on at least 50 occasions.

67. On information and belief, despite the fact that Mr. Tucker's trial was originally set for June 8, 2015, as of ten days prior to trial, his attorney had not had the chance to conduct any investigation into the case, contact or summon any witnesses, hire an investigator, review and explain the relevant discovery materials, or discuss trial strategy with Mr. Tucker. In total, on information and belief, Mr. Tucker has spent less than 20 minutes with his attorney throughout the course of his representation. Moreover, other than a bail reduction motion, Mr. Tucker's attorney never filed any motions on his behalf.

68. After remaining in jail for three months while unable to discuss a possible defense with his attorney, Mr. Tucker pleaded guilty to attempted strangulation on June 2, 2015. He is scheduled to be sentenced on August 3, 2015.

***Jason Sharp***

69. Plaintiff JASON MONROE SHARP is and at all times pertinent herein has been a resident of Kellogg, Idaho. Mr. Sharp was taken into custody on May 16, 2014, after he was charged with burglary and grand theft, exposing him to as much as 30 years in prison. Mr. Sharp was not represented by counsel at his initial appearance in court, during which his bail was set at $50,000. Mr. Sharp could not afford to post bail, and as a result, he remained in the Shoshone County Jail for approximately two weeks.

70. On information and belief, Shoshone County relies on contract attorneys, who are paid an annual fixed fee, to represent indigent criminal defendants being prosecuted within its jurisdiction.

71. On information and belief, attorney caseloads in Shoshone County vastly exceed national standards and are among the heaviest of any county in Idaho.

72. Although Mr. Sharp was assigned a public defender at his initial appearance, he has had minimal contact with his attorney. Mr. Sharp had to advocate on his own behalf—without the assistance of his lawyer—in favor of a bond reduction. On information and belief, the court first agreed to reduce Mr. Sharp's bail to $5,000, after Mr. Sharp explained that he was not on probation at the time of his arrest, as the court had previously believed. Then, after receiving a letter of support from Mr. Sharp's employer vouching for him and recommending his release, the court released Mr. Sharp on his own recognizance. Neither the bail reduction, nor the court's

ultimate decision to release Mr. Sharp, were the result of any efforts undertaken by his public defender.

73. Given the demands of his attorney's caseload, Mr. Sharp has only been able to meet with his attorney for approximately 90 minutes—total—throughout the 13 months during which his case has been pending. On information and belief, most of those meetings have occurred in or just outside the courtroom prior to a hearing. Mr. Sharp also has been unable to review the discovery in his case, despite repeated requests.

74. Although Mr. Sharp is scheduled to go to trial on July 14, 2015, and faces up to 30 years in prison if convicted, on information and belief, his attorney has not had the chance to conduct any investigation into the case, contact or summon any witnesses, hire an investigator, review and explain the relevant discovery materials, or discuss trial strategy with Mr. Sharp.

***Naomi Morley***

75. Plaintiff NAOMI HELEN MORLEY is and at all times pertinent herein has been a resident of Garden Valley, Idaho. Ms. Morley was taken into custody in March 2014, following a serious single car accident on an Ada County roadway.

76. Ada County relies on an institutional public-defender office to represent indigent criminal defendants being prosecuted within its jurisdiction. In the event that the public-defender office is unable to represent a defendant due to a conflict of interest, the County relies on conflict counsel to provide representation.

77. Although Ms. Morley was assigned a public defender at her initial appearance before the court, she had no opportunity to actually confer with the public defender at that initial proceeding, during which her bail was set at $15,000. Ms. Morley could not afford to post bail, causing her to remain in jail for three weeks until her bail was reduced. It was later discovered

that the public defender's office could not represent Ms. Morley due to a conflict of interest. Conflict counsel was subsequently appointed.

78. Ms. Morley's attorneys—both her public defender and her conflict attorney—have been unable to adequately investigate the charges against her. Her current attorney has encouraged her to accept a plea deal that Ms. Morley understands would require her to spend 10 years in prison, despite her claims of innocence. When Ms. Morley inquired about the possibility of retaining an expert to dispute the findings of any blood sample analysis, she was told that, if she wanted to do so—or do any other outside testing to challenge the prosecution's allegations—she would have to pay for the testing herself. Given her indigent status, this is an expense that Ms. Morley cannot afford.

79. Moreover, Ms. Morley has attempted to discuss the case with her attorney several times, but has been unable to do so in any meaningful way. Although Ms. Morley told her attorney about a witness who would testify that the controlled substances allegedly found were the witness's and not Ms. Morley's, it was only through her own efforts that Ms. Morley was able to obtain a signed affidavit from the witness, who acknowledged, under oath, that any controlled substances allegedly found belonged to the witness. Furthermore, when Ms. Morley tried to discuss certain discrepancies in the police report, her attorney was apparently so overloaded with cases that he did not have the time to engage with her, and her concerns went unheeded. On information and belief, had her attorney had a manageable caseload and thus the time to discuss the facts of her case, as well as her medical history, in greater detail, he would have recognized immediately that she had a valid defense that required thorough investigation. Ms. Morley is scheduled to go to trial on June 29, 2015.

*Jeremy Payne*

80. Plaintiff JEREMY MICHAEL PAYNE is and at all times pertinent herein has been a resident of Payette, Idaho. Mr. Payne was taken into custody on January 25, 2015, after he was charged with driving without a license, as well as possession of a controlled substance and drug paraphernalia, exposing him to over seven years in prison. Mr. Payne was not represented at his initial appearance in court, during which his bail was set at $30,000. Mr. Payne could not afford to post bail, and as a result, he was remanded to the Payette County Jail, where he remained until being released on June 9, 2015, when the State postponed his trial date for the third time.

81. Payette County relies on contract attorneys, who are paid an annual fixed fee, to represent indigent criminal defendants being prosecuted within its jurisdiction.

82. Although Mr. Payne was assigned a public defender at his initial appearance, he did not have any contact with his attorney until the minutes leading up to his next court appearance on February 6, 2015. In the months that followed, Mr. Payne went before the court three more times and again met briefly with his attorney either in court just prior to the proceedings, or in jail the day before the court appearance. Given the demands of his caseload, Mr. Payne's attorney only met with him at the Payette County Jail on three occasions. Mr. Payne has also been unable to contact his attorney by phone. During the two-week period between May 12 and May 26, Mr. Payne left at least six phone messages for his attorney, none of which were returned.

83. At Mr. Payne's pretrial hearing on April 17, 2015, his attorney informed him that in order to move forward with his jury trial in June 2015, he would have to waive his right to a speedy trial. However, his attorney failed to adequately explain the consequences of the waiver, and the

fact that Mr. Payne's refusal to waive his speedy trial right could result in his release from custody.

84. On information and belief, despite that Mr. Payne's trial has now been rescheduled three times, Mr. Payne's attorney has not had the chance to conduct any investigation into the case, nor has the attorney reviewed and explained the relevant discovery materials or discussed trial strategy with Mr. Payne. In total, Mr. Payne has only spent approximately 30–45 minutes with his attorney throughout the course of his representation.

**B. Defendants**

85. Defendant STATE OF IDAHO has violated and continues to violate the Idaho and federal constitutions, which require it to ensure that adequate indigent-defense services are provided to Idaho's poorest citizens. The State Capital and center of State government is in Ada County.

86. Defendant C.L. "BUTCH" OTTER is the Governor of the state of Idaho and is subject to this lawsuit in his official capacity as to all claims herein. As the chief executive of the state, Governor Otter bears ultimate responsibility for the provision of constitutionally mandated services to the people of Idaho. In 2005, the CJC was created by Executive Order and tasked with addressing "important criminal justice issues and challenges." Governor Otter maintains supervisory authority over the CJC.

87. Defendants Hon. Molly Huskey, Darrell G. Bolz, Sara B. Thomas, William H. Wellman, Kimber Ricks, Sen. Chuck Winder, and Rep. Christy Perry are all of the members Idaho's Public Defense Commission. They are subject to this lawsuit in their official capacities as members of the Commission. The Commission is responsible for promulgating rules related to training and data-reporting requirements for defense attorneys across the state, and making recommendations

to the legislature regarding core requirements for indigent-defense contracts, qualifications, and experience standards for defending attorneys, enforcement mechanisms, and funding.

## CLASS ACTION ALLEGATIONS

88. Plaintiffs bring this class action lawsuit pursuant to Idaho Rule of Civil Procedure 23 on behalf of all indigent persons who are now or who will be under formal charge before a state court in Idaho of having committed any offense, the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correction facility (regardless of whether actually imposed) and who are unable to provide for the full payment of an attorney and all other necessary expenses of representation in defending against the charge.

89. The Plaintiffs in this case represent a class (the "Class"), and this action should be certified as a class action under Idaho Rule of Civil Procedure 23.

90. Every day, hundreds, if not thousands, of individuals who are unable to afford an attorney and who depend on the State of Idaho to provide them with effective legal representation are criminally prosecuted in Idaho.[36] As such, the Class is so numerous that joinder of all members is impractical.

91. There are important questions of law and fact raised in this case that are common to the Class, including:

a. Whether the State is required under the United States and Idaho Constitutions, and under Idaho law, to provide indigent defendants with effective legal representation, including at the time of initial appearance;

b. Whether the State is currently providing constitutionally sufficient representation for indigent defendants in their respective jurisdictions;

[36] Idaho Legislative Services Office – CFY 2014 Budget & Policy Analysis, Figure 3.0, *available at* http://legislature.idaho.gov/sessioninfo/2014/interim/pdef1028_hoskins.pdf.

c. Whether the State has violated the United States and Idaho Constitutions by failing to implement, administer, and oversee adequate public-defense systems;

d. Whether, by abdicating its responsibility to fund, supervise, and administer indigent defense services to the counties, the State has failed to ensure that indigent defendants are provided with effective legal representation, all in violation of the United States and Idaho Constitutions;

e. Whether the State's failure to adequately fund and supervise the delivery of indigent-defense services impedes the provision of effective legal representation to indigent defendants; and

f. Whether the State's failure to develop uniform workload and performance standards for public-defense attorneys in Idaho impedes the provision of effective legal representation to indigent defendants.

92. The claims of the Class representatives are typical of the claims of the Class as a whole. Like all of the Class members, the Class representatives are being denied their right to counsel, in violation of the Sixth Amendment to the U.S. Constitution and Article 1, Section 13, of the Idaho Constitution, as a direct result of State's ongoing failure to adequately fund, supervise, and administer indigent-defense services in Idaho.

93. The Class representatives will fairly and adequately protect the interests of the Class. The interests of the Class representatives are not in conflict with the interests of any other indigent defendant, and the Class representatives have every incentive to pursue this litigation vigorously on behalf of themselves and the Class as a whole. Moreover, the Class representatives are being represented by experienced, well-resourced counsel in this matter, including the American Civil Liberties Union of Idaho, the national American Civil Liberties

Union's Criminal Law Reform Project, and the law firm of Hogan Lovells US LLP, whose attorneys possess substantial expertise in prosecuting class action lawsuits generally, and in indigent-defense reform litigation in particular.

94. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct, exacerbating the differing and inadequate public-defender programs currently in place in various counties in the State. Such a risk is of particular concern in this case since the lack of uniform performance standards is central to the Plaintiffs' allegations.

95. The common questions of law and fact articulated above predominate over any case-specific questions that may arise out of any of the individual Class members' criminal cases. As such, a class action is superior to other available methods for the fair and efficient adjudication of this matter.

96. Defendants have failed to adequately fund, supervise, and administer indigent- defense services in Idaho, thereby violating the rights of poor defendants across the state. As such, these Defendants have acted and refused to act on grounds generally applicable to the entire Class, thereby making it appropriate for this Court to issue final injunctive and declaratory relief for all Class members.

## FACTUAL ALLEGATIONS

***Overview of the Current State of Indigent-Defense in Idaho***

97. The State of Idaho leaves the responsibility for providing trial-level legal representation to indigent criminal defendants to each of its 44 counties.

98. Yet the State does not provide any funding, training, or supervision to support the delivery of indigent-defense services at the trial level.

99. According to the NLADA Report, as well as the more recent county-by-county surveys conducted by the Idaho Criminal Justice Commission and the ACLU, respectively, no county in Idaho is currently providing indigent-defense services that meet state or federal legal standards.

100. State officials themselves have recognized the current constitutional crisis regarding indigent defense services in Idaho. In August 2013, the Chief Justice of the Idaho Supreme Court noted that "our system for the defense of indigents, as required by Idaho's constitution and laws, is broken." And Governor Otter acknowledged in his 2015 State of the State address that, despite the 2014 amendments to Idaho's public defense statutes, "our current method of providing legal counsel for indigent criminal defendants does not pass constitutional muster."

101. These constitutional and statutory deficiencies manifest themselves in myriad ways, including (1) failure to provide counsel to indigent defendants at their initial appearance; (2) extended and unnecessary pretrial detention; (3) excessive caseloads that far exceed national standards; (4) lack of sufficient investigation; (5) lack of sufficient expert analysis and testimony; (6) lack of consistent, effective, and confidential communication between indigent defendants and public defenders; (7) continued use of fixed-fee contracts for attorneys providing indigent-defense services; (8) lack of public-defender independence; (9) lack of sufficient training in the field of criminal defense; (10) lack of informed and consistent oversight of the provision of indigent-defense services throughout the State; and (11) lack of sufficient supervision and evaluation.

102. Each of these deficiencies is directly linked to the State's longstanding and on-going failure to provide the funding, supervision, and training necessary to meet its legal obligations in the area of indigent defense.

***Lack of Representation at Initial Appearance***

103. Under Idaho law, "[e]very defendant, who according to law is entitled to appointed counsel, shall have counsel assigned to represent the defendant, from initial appearance before the magistrate or district court, unless the defendant waives such appointment."[37]

104. Section 19-852 of the Idaho Code guarantees that an indigent person "under formal charge of having committed, or [] being detained under a conviction of a serious crime . . . is entitled to be represented by an attorney."[38]

105. Section 19-851(d) defines "serious crime" as "any offense the penalty for which includes the possibility of confinement, incarceration, imprisonment or detention in a correctional facility, regardless of whether actually imposed."[39]

106. An initial appearance is defined by Idaho Criminal Rule 5(a) as "the first appearance of the defendant before any magistrate," during which the judge or magistrate may, among other things, set bail and take a plea from the defendant.[40]

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[37] I.C.R. 44(a).

[38] I.C. § 19-852.

[39] I.C. § 19-851(d).

[40] *See* I.C.R. 5(a)

107. In 2014, the Pre-Trial Justice subcommittee of the CJC conducted a survey of all 44 Idaho counties to determine, among other things, the number of counties that provide counsel for indigent defendants at their initial appearance before a judge or magistrate.

108. According to the CJC survey, only five Idaho counties provide counsel for indigent defendants at their initial appearances, despite the critical nature of such proceedings.

109. None of the named Plaintiffs was represented by counsel at his or her initial appearance.

110. Plaintiff Tucker was not represented by counsel at his initial appearance, even though he was charged with a serious felony and had his bail set at $40,000. Because he could not afford to pay his bail and had no attorney available to argue for a bond reduction on his behalf, Mr. Tucker remained in jail for three months before pleading guilty.

111. Plaintiff Sharp was not represented by counsel at his initial appearance, even though he was charged with two serious felonies and had his bail set at $50,000. Because he could not afford to pay his bail and had no attorney available to argue for a bond reduction on his behalf, Mr. Sharp remained in jail for two weeks until he was able to convince the court—without the assistance of his attorney—to reduce his bond.

112. An attorney from the Ada County Public Defender's office was present during Plaintiff Morley's initial appearance, but Ms. Morley did not have an opportunity to discuss her case with counsel at that time, and that office soon after determined that it had a conflict of interest and could not represent Ms. Morley. Ms. Morley's bail was set at $15,000 at her initial appearance. Because she could not afford to pay his bail and had no attorney available to argue for a bond reduction on her behalf, she remained in custody for three weeks until her bail was reduced.

113. Plaintiff Payne was not represented by counsel at his initial appearance, even though the proceeding included the court's decision to set Mr. Payne's bail at $30,000. He could not afford to pay his bail and had no attorney available to argue for a bond reduction on his behalf. Mr. Payne remained in jail until June 9, 2015, when the state asked the court to postpone Mr. Payne's trial for a third time.

114. On information and belief, criminal defendants in Bingham County routinely enter pleas at their initial appearances without having had the opportunity to consult with an attorney. Indeed, at initial appearances held on May 28, 2015, defendants were asked to enter a plea to the charges against them without counsel present and without having affirmatively waived their right to counsel or even having been informed by the judge of their right to counsel. More than half pleaded guilty and were sentenced without counsel present.

***Unnecessary and/or Extended Pre-Trial Detention***

115. Due in part to the lack of legal advocacy available to indigent defendants at their initial appearances, bail is often set at unnecessarily high amounts that low-income defendants cannot afford. For instance, Plaintiff Sharp's bail was originally set at $50,000, without any discussion between the court and Mr. Sharp regarding his ability to pay, employment status, or other relevant factors, including the fact that Mr. Sharp was not on probation when he was arrested, as the court originally believed. It was not until two weeks later that the court agreed to reduce Plaintiff's bond, after Mr. Sharp was able to explain to the court that he was not on probation at the time of his arrest and to have his employer write a letter to the court in support of his request for pretrial release.

116. The attendant consequences for spending time in jail are severe. According to research studies conducted or cited by the U.S. Department of Justice's Bureau of Justice

Assistance and the Arnold Foundation, among others, whether or not a criminal defendant is held in pretrial custody can have a tremendous impact on the outcome of the case. For instance, in its review of outcomes for more than 150,000 defendants in Kentucky during 2009–2010, the Arnold Foundation determined that "[w]hen other relevant statistical controls are considered, defendants detained until trial or case disposition are 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison than defendants who are released at some point pending trial."[41] Similarly, in New York City, "the citywide conviction rate for cases with no pretrial release was 92%. By contrast, the conviction rate for cases in which the defendant was at liberty from arraignment to disposition was 50%."[42]

117. Aside from the impact pre-trial detention can have on the defendant's criminal case, it can also significantly affect a defendant's employment or other obligations that he/she is unable to fulfill while in custody. For instance, prior to Plaintiff Tucker's arrest, he received a traffic ticket, which he intended to pay prior to the due date. Following his arrest, however, Mr. Tucker was unable to afford bail and remained in pretrial detention for over three months. Consequently, Mr. Tucker failed to resolve his traffic ticket on time and had his driver's license suspended while he was in custody. If it were not for his employer's uncommon willingness to write to the court on his behalf, Plaintiff Sharp likely would have remained in jail pending trial and lost his job as a result. And Plaintiff Morley remained in jail for two weeks prior to posting bond, despite suffering from severe injuries in connection with a serious car accident that occurred on the day of her arrest.

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[41] Christopher T. Lowenkamp et al., Laura and John Arnold Foundation, Investigating the Impact of Pretrial Detention on Sentencing Outcomes 10 (Nov. 2013).

[42] Mary Phillips, N.Y.C. Crim. Just. Agency, Pretrial Detention and Case Outcomes 32 (Nov. 2007).

118. Pre-trial detention can also serve as an inappropriate incentive to obtain a guilty plea in exchange for release from jail. Such an incentive can and has been used even if a defendant has not yet spoken to a lawyer and notwithstanding the person's innocence or the availability of viable defenses to challenge the State's case. As noted above, Plaintiff Tucker, who spent three months in jail proclaiming his innocence and hoping—in vain—for a thorough investigation of his case, recently pleaded guilty after being told that he would be released from custody pending his sentencing.

***Excessive Caseloads and Workloads***

119. In 1973, under the direction of the U.S. Department of Justice, the National Advisory Commission on Criminal Justice Standards and Goals developed national caseload standards for the first time. According to NAC Standard 13.12: "The caseload of a public defender attorney should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25."[43]

[43] It should be noted that, in recent years, experts in the field have suggested that the NAC standards are outdated and fail to account for the added complexities that have been infused into criminal defense practice over the last 40 years, including the introduction of sexually violent offender commitment proceedings, persistent offender or "three-strikes" statutes, significant collateral consequences resulting from convictions, and a growing recognition of the unique nature of juvenile defense. As such, commentators have argued that the NAC standards are themselves too high. *See* Norman Lefstein, Securing Reasonable Caseloads: Ethics and Law in Public Defense 43–48 (2011).

120. The NAC standards do not contemplate a mixed caseload. In other words, an attorney who handles felony cases should carry no more than 150 such cases during the course of a year, and nothing else.[44]

121. In August 2009, the American Bar Association released its "Eight Guidelines of Public Defense Related to Excessive Workloads" ("Guidelines") in an effort to set forth a "detailed action plan . . . to which those providing public defense should adhere as they seek to comply with their professional responsibilities."[45] Among other things, the Guidelines include assessment of "whether excessive workloads are preventing [public defenders] from fulfilling performance obligations"; supervision and monitoring of workloads; training with regard to an attorney's ethical duties in the face of excessive workloads; and the need for those managing the public defense system to determine whether excessive workloads exist.[46]

122. Due in part to these excessive caseloads, and the resulting lack of time and resources available to public defenders, Plaintiffs were not represented at their initial appearances, were unable to communicate effectively with their attorneys on a consistent basis, and did not have their cases adequately investigated (if at all), or otherwise prepared in advance of trial. Moreover, as a result of their heavy caseloads, the public defenders representing Plaintiffs did not have the time or support necessary to file appropriate pretrial motions with the court.

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[44] "The standards are disjunctive, so if a public defender is assigned cases from more than one category, the percentage of the maximum caseload in each should be assessed and the combined total should not exceed 100%." Justice Denied, Chapter 2, at 66 n. 102 (citing National Advisory Commission on Criminal Justice Standards and Goals: Courts 276 (1973)).

[45] ABA Eight Guidelines of Public Defense Related to Excessive Workloads, 1.

[46] *Id.*

123. Based on recent court observations, public defenders in Kootenai, Nez Perce, Payette, Bannock, and Bonneville counties, among others, have so many cases assigned to them that they are unable to even identify their clients until minutes before the defendants' court appearances.

124. Moreover, excessive caseloads can negatively impact the relationships between attorneys and their clients. During court proceedings in Bonneville County on May 28, 2015, for instance, one defendant met with his lawyer in open court, just next to and within hearing distance of prosecutors, the judge, court personnel, other defendants, and members of the public attending court. On information and belief, after a heated exchange between the defendant and his attorney—which could be overheard throughout the courtroom—the public defender stated that she had "too many cases" and as a result, could not "deal with this right now." On information and belief, the defendant then indicated that he wished to "fire" his attorney and represent himself instead. As a result of trying to speak with his lawyer to understand his case, the defendant's own attorney then summoned the marshal to escort the defendant out of the courtroom.

***Lack of Effective or Consistent Attorney-Client Communication***

125. In many instances, indigent defendants in Idaho have insufficient access to their assigned public defenders and are unable to communicate with their attorneys for weeks or months at a time, due in large part to the extremely heavy caseloads public defenders are forced to handle, the lack of sufficient support staff to help attorneys manage their contacts and relationships with their clients, and the fixed-fee contracts used in many counties, which provide economic incentives to spend as little time as possible on any individual case. This lack of communication makes it virtually impossible for indigent defendants, including the named

Plaintiffs, to understand developments in their case or to assist in their own defense in any meaningful way.

126. Because of public defenders' heavy caseloads, lack of support, and contractual obligations, and the resulting lack of consistent communication between them and their clients, many indigent defendants, including those who are not in custody, are unable to access the discovery materials in their cases. Indeed, Plaintiffs Payne, Tucker, and Sharp all have been unable to access the discovery materials in their cases.

127. Because Idaho's public defenders are overextended and lack sufficient resources, they often fail to receive or follow up on suggestions made by the defendant or the defendant's family with regard to possible witnesses, alibis, or other potentially exculpatory evidence. For instance, Plaintiff Morley urged her public defender to obtain a statement from a witness who could provide exculpatory testimony to prove Morley's innocence. No such statement was obtained by her attorney. As a result of Ms. Morley's own efforts, however, she recently received a signed affidavit from the witness, confessing responsibility for the alleged crimes and apologizing for the harm that she has caused Ms. Morley.

128. As illustrated by the named Plaintiffs' experiences, when indigent defendants—particularly those in custody—do get the opportunity to speak with their attorneys, the meetings are usually very short and often take place in open court or other areas of the courthouse that lack the privacy necessary for truly confidential and privileged discussions. This kind of interaction makes it difficult to establish a meaningful attorney-client relationship in which defendants can ask questions and gain a clear understanding of what is happening in their case and in which public defenders can answer their clients' questions thoroughly and gather all the information they need to advocate effectively.

129. Plaintiffs Payne and Tucker, both of whom spent substantial time in pretrial detention before being recently released, tried to contact their public defenders repeatedly while in custody but received no response. Each also alleges that he met with his attorney for a total of less than an hour since he was arrested.

130. While they are not currently in custody, Plaintiffs Sharp and Morley allege that they are unable to communicate effectively with their attorneys. Specifically, both indicate that that their questions and suggestions go routinely unanswered by their attorneys; and that they are unclear about developments in their cases, or the implications of such developments.

***Lack of Investigation and Expert Analysis and Testimony***

131. In counties across the state, having a publicly funded investigator or expert assigned to a case is a luxury that is most often reserved for indigent defendants charged with particularly serious felonies.

132. Of the 34 counties that use a contract-defender model, the vast majority do not increase the amount of the contract to account for the cost of investigators and experts. Rather, contract attorneys must make special requests to the court or the local county's board of commissioners, on a case-by-case basis, to obtain the resources necessary to retain an investigator or expert.

133. On information and belief, public defenders often choose not to make such requests at all, given the very limited funds available to meet them. Indeed, Plaintiff Morley has been told that if she wanted to have an expert analyze the drug evidence in her case and be prepared to testify at trial, she would have to pay for it herself. Ms. Morley is unable to pay for the expert on her own, and therefore could be prevented from having expert testimony to aid in her defense.

134. On information and belief, all of the Plaintiffs' appointed lawyers have been unable to investigate Plaintiffs' cases in any meaningful way, making it difficult to prepare defenses likely to succeed at trial—or in the context of plea negotiations, for that matter.

***Use of Fixed-Fee Contracts***

135. There are currently at least 19 Idaho counties utilizing a fixed-fee contract system, notwithstanding the fact that such contracts are prohibited by statute.

136. For instance, in Payette County, the current public-defense contract provides that the County will pay the contracting attorney $560 for each "Public Day" that the attorney works. A Public Day is defined in the contract as "any day in which CONTRACTOR must appear in Court for a client he is appointed to under this Agreement, or any day in which CONTRACTOR works for 5 or more hours on clients he is appointed to under this Agreement." While the contract goes on to state that "[t]here is not a limit to the number of days that CONTRACTOR may use as Public Days in any given month," the fixed daily rate creates a disincentive to spend any extended amount of time in court, or to spend more than the minimum five hours working on indigent-defense cases. This is especially problematic given that the public defense contractors in Payette County are still permitted to maintain a separate private practice. Moreover, the contract states explicitly that it "does not include any costs of transcripts, or any expenses of trial, investigation or appeal for which the Court may approve expenditures." In order to access any additional funds, the contractor must first obtain "advance approval for such expenses from the district judge or magistrate having jurisdiction over the case."

137. Upon information and belief, the 2010–2011 public-defense contract in Gem County, which is the most recent contract to be made publically available by the County, provides that the County "shall pay the sum of One Hundred Eighty Thousand Dollars

($180,000) for Public Defense services" during the contract period, and that that sum is to be paid in twelve installments of $15,000 each. In the event that an indigent defendant in Gem County is charged with a "special-circumstance offense" (i.e. murder), the contracting attorney must negotiate with the County for certain "extraordinary expenses," such as "psychological evaluation and expert testimony, ballistics and forensic scientific testing and expert testimony, change of venue expenses, and conflict-of-interest attorneys." It appears that, for all other alleged crimes, such expenses would have to be taken out of the fixed $180,000 fee, along with all expenses associated with salaries, insurance, equipment, and office space.

138. The fixed-fee contract system in Gem County may also explain a disturbing occurrence during court proceedings held on May 27, 2015, during which the public defender appeared to ignore a clear conflict of interest. The case in question involved co-defendants—one adult, one juvenile—charged with various drug crimes. While the two defendants were represented by different attorneys, upon information and belief, both lawyers work in the office of the contracting attorney. This was particularly noteworthy since one of the defendants had already pleaded guilty, while the other considered whether or not to do the same. Indeed, at various points during the proceeding, both defendants and both attorneys were present in the courtroom while their individual circumstances were discussed. Since the Gem County contract—like most other fixed-fee contracts in Idaho—requires the public defender to pay for conflict counsel out of the lump sum payment they receive from the county, there is a powerful disincentive to ignore or attempt to work around clear conflicts of interest.

139. In Custer County, the current public-defender contract states that the contracting attorney shall receive an annual sum of $50,000 for services rendered, and an additional $65.00 per hour for any time spent on indigent defense cases exceeding 50 hours in any given month.

However, upon information and belief, the current Custer County public defender is based in Blackfoot, Idaho, approximately two hours from the county seat in Challis. Nevertheless, the contract states that "the Attorney shall not charge Custer County for the travel expenses."

140. Fixed-fee contracts create a serious conflict of interest for defending attorneys because they encourage the attorney to spend as little money and time as possible on each case in order to maximize the amount of money and time that can be used to cover other cases, and other expenses, including compensation for the contracting attorney and any staff to assist with representation.

141. To make matters worse, upon information and belief, at least 26 of the 34 counties operating on a contract system permit public defenders to maintain a private legal practice. Indeed, the Franklin County public defense contract states explicitly that "[a]ttorneys providing services under this Agreement may undertake representation of person charged with a crime in this or any other jurisdiction for a fee."

142. Plaintiff Payne was arrested and charged in Payette County and was assigned a public defender. Due, in part, to the fixed-fee contract in effect in Payette County, the contracting attorney who represented Plaintiff Payne had limited incentive to spend the money and time necessary to locate and interview witnesses, secure expert testimony, or otherwise explore ways of challenging the criminal charges at issue. Indeed, the defender had substantial incentive *not* to engage in any defense activity or strategy that is not absolutely required.

*Lack of Independence*

143. The first of the American Bar Association's ("ABA") *Ten Principles* is to ensure that "the public defense function, including the selection, funding, and payment of defense counsel, is independent."[47]

144. In many counties, the local board of commissioners retains the authority to hire and fire the public defender at will, even though few, if any, of the commissioners has any experience working as attorneys, let alone supervising attorneys.

145. The board of commissioners also typically controls the amount of funding that will be extended to the public defender, and in some cases, will make the final decision as to whether a request for an investigator or expert will be approved.

146. Upon information and belief, at least 17 counties require public defenders to request additional resources from either the court or the county commissioners to pay for an investigator or an expert in a given case.

147. Upon information and belief, at least 10 counties require public defenders to request additional resources from either the court or the county commissioners to pay for laboratory testing.

148. Given the vast authority that boards of county commissioners maintain over public defenders and the day-to-day operations of the public-defender office, there is a real fear of retribution among public defenders. On information and belief, public defenders working in institutional offices, as well as those working under contract, are concerned that they will lose their jobs or contracts, or be otherwise disciplined, if they run afoul of the commissioners'

[47] ABA Ten Principles of A Public Defense Delivery System no. 1, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

expectations. As a result, many of Idaho's public defenders are beholden to their commissioners and therefore lack the independence necessary to do their jobs effectively.

149. Indeed, Defendant Otter recently approved, and the State of Idaho enacted, changes to Idaho's indigent-defense statutes that removed a two-year-minimum term requirement for public defenders in institutional offices. Removing the two-year-minimum term requirement severely undercuts any independence those public defenders might hope to have, as it leaves them vulnerable at any time to termination for no reason or for unjustified reasons. The removal of the minimum term requirement was done over the expressed objection of public defenders.

150. The State's failure to set standards regarding the commissioners' ability to hire and fire public defenders without justification results in, among other things, less zealous advocacy on the part of the defending attorneys, including a reticence to seek supplemental funding for investigators, experts, or other necessary resources.

***Lack of Sufficient Supervision and Evaluation***

151. While independence is essential, the last of the ABA *Ten Principles* also requires that public defenders be "supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards." ABA *Ten Principles*, no. 10.

152. The State currently plays no role whatsoever—either by way of directly supervising or setting guiding principles regarding the same—in supervising or evaluating the work done by public-defense offices and contractors in the various counties.

153. The limited supervision that does exist is often deficient since it is carried out by local county commissioners with little or no experience overseeing the work of an attorney.

154. Moreover, because the State has not established uniform performance standards, there is very little reliable data available for managers to evaluate the work of the attorneys they oversee, whether it be related to overall workloads, the extent and nature of client contact, motion practice, adequacy of investigation, or level of preparation for hearings and trials.

***Harm to Plaintiffs***

155. All of the above-mentioned issues have combined to cause tremendous harm to Plaintiffs and to the Class as a whole.

*Plaintiff Tracy Tucker*

156. Plaintiff Tracy Tucker was not represented by counsel at his initial appearance, resulting in his inability to make any arguments as to the amount of his bail, which was ultimately set by the court at $40,000. Because he was not able to afford bail, Mr. Tucker remained in jail for three months pending the resolution of his case. Throughout the duration of his case, Mr. Tucker has been unable to communicate effectively or consistently with his public defender, making it virtually impossible for him to participate in the development of his defense. In addition, Mr. Tucker's attorney was unable to conduct any meaningful investigation into his case, review the relevant discovery with his client, or share with Mr. Tucker his thoughts with regard to trial strategy and related matters. Mr. Tucker ultimately pleaded guilty after spending three months in jail. He is scheduled for sentencing on August 3, 2015.

*Plaintiff Jason Sharp*

157. Plaintiff Jason Sharp was not represented by counsel at his initial appearance, resulting in his inability to make any arguments as to the amount of his bail, which was originally set by the court at $50,000. Since Mr. Sharp could not afford to post bail, he remained in the Shoshone County Jail for approximately two weeks until, without the help of his lawyer,

Mr. Sharp was able to convince the court that his bail amount was inappropriate given the circumstances of his case. He was subsequently released pending trial. Throughout the duration of his case, however, Mr. Sharp has been unable to communicate effectively or consistently with his public defender, making it virtually impossible for him to participate in the development of his defense. In addition, Mr. Sharp's attorney was unable to conduct any meaningful investigation into his case, review the relevant discovery with his client, or share with Mr. Sharp his thoughts with regard to trial strategy and related matters. Mr. Sharp is scheduled to go to trial on July 14, 2015, and faces up to 30 years in prison if convicted on both counts.

*Plaintiff Naomi Morley*

158. Although counsel from the Ada County Public Defender's office was present with Plaintiff Naomi Morley at her initial appearance, Ms. Morley had no opportunity to consult with that lawyer at that time, resulting in her inability to make any arguments as to the amount of her bail, which was ultimately set by the court at $15,000. In any event, that office soon after determined it could not represent Ms. Morley due to a conflict of interest. Because she was not able to afford bail, Ms. Morley remained in jail for two weeks before having her bail reduced and posting bond—all while recovering from serious injuries sustained in a car accident on the day of her arrest. Throughout the duration of her case, Ms. Morley has been unable to communicate effectively or consistently with her public defender, making it virtually impossible for her to participate, in any meaningful way, in the development of her defense. In addition, Ms. Morley's attorney has been unable to conduct any meaningful investigation into her case, review the relevant discovery with his client, or share with Ms. Morley his thoughts with regard to trial strategy and related matters. Ms. Morley is scheduled to go to trial on June 29, 2015, and faces more than 15 years in prison if convicted.

*Plaintiff Jeremy Payne*

159. Plaintiff Jeremy Payne was not represented by counsel at his initial appearance, resulting in his inability to make any arguments as to the amount of his bail, which was ultimately set by the court at $30,000. Because he was not able to afford bail, Mr. Payne has remained in jail pending resolution of his case. Throughout the duration of his case, Mr. Payne has been unable to communicate effectively or consistently with his public defender, making it virtually impossible for him to participate, in any meaningful way, in the development of his defense. In addition, Mr. Payne's attorney has been unable to conduct any meaningful investigation into his case, review the relevant discovery with his client, or share with Mr. Payne his thoughts with regard to trial strategy and related matters. Mr. Payne is scheduled to go to trial on July 21, 2015, and faces up to seven years in prison if convicted.

160. The State of Idaho has not provided Plaintiffs, or those similarly situated, with the representation to which they are constitutionally and otherwise legally entitled. They have not been provided with adequate representation at every critical stage; have not had sufficient opportunity to discuss their cases with their attorneys, to participate in building a defense against the charges they face, or to make informed decisions about the disposition of their cases. Upon information and belief, the State of Idaho will continue to fail to provide Plaintiffs with the representation to which they are entitled.

161. The representation provided to Plaintiffs is illustrative of the patterns of representation provided to indigent defendants throughout the State of Idaho and results from the structural and systemic failings that were identified in the 2010 NLADA Report and subsequent studies carried out over the last five years.

**State Liability**

162. The United States Supreme Court has made clear that pursuant to the Sixth Amendment to the U.S. Constitution, it is the states' constitutional duty to provide for the effective assistance of counsel for criminal defendants who are unable to afford an attorney.

163. The State of Idaho has failed to provide any significant funding to support the provision of indigent defense services across the state.

164. The State of Idaho has failed to provide any supervision over the provision of indigent defense services across the state.

165. The State of Idaho has failed to establish or adopt any consistent, statewide caseload standards for public defenders in the state.

166. The State of Idaho has failed to establish or adopt any consistent, statewide performance standards for public defenders in this state.

167. In light of the NLADA's 2010 report, the ongoing work of the CJC and other committees tasked with studying indigent defense issues in Idaho, and the amendments to the public defense statutes in 2014, the State of Idaho has been on notice for more than half a decade that its public-defender system is failing to provide constitutionally sufficient representation.

168. Despite being on notice of the many failings of Idaho's indigent defense system, the State has failed to take sufficient action to remedy the deficiencies.

169. The State's failure to take sufficient steps to remedy the deficiencies of Idaho's indigent defense system is the proximate cause of the harm suffered by indigent criminal defendants throughout Idaho—including the named Plaintiffs and the Class they represent.

## CLAIMS FOR RELIEF

### First Claim for Relief
**Violation of the Sixth Amendment to the United States Constitution and 42 U.S.C. § 1983 (All Plaintiffs and the Class against All Defendants)**

170. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs of this Complaint.

171. The Sixth Amendment to the United States Constitution requires the State of Idaho to ensure that all indigent criminal defendants receive meaningful and effective legal representation at all critical stages of their cases.

172. 42 U.S.C. § 1983 provides for suit against the government for constitutional violations.

173. The State of Idaho has violated the Sixth Amendment because it has failed to ensure that all indigent criminal defendants receive meaningful and effective legal representation at all critical stages of their cases, including at initial appearances, resulting in the constructive denial of counsel.

### Second Claim for Relief
**Violation of Article 1, Section 13 of the Idaho Constitution (Right to Counsel) (All Plaintiffs and the Class against All Defendants)**

174. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of all preceding paragraphs.

175. Article 1, Section 13, of the Idaho Constitution requires the State of Idaho to ensure that all indigent criminal defendants receive meaningful and effective legal representation.

176. The State of Idaho has failed to ensure that all indigent criminal defendants receive meaningful and effective legal representation at all critical stages of the case, including at initial appearance, in violation of Article 1, Section 13, of the Idaho Constitution.

**Third Claim for Relief**
**Violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983**
**(All Plaintiffs and the Class against All Defendants)**

177. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of all preceding paragraphs.

178. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State of Idaho to ensure that all indigent criminal defendants receive meaningful and effective legal representation.

179. 42 U.S.C. § 1983 provides for suit against the government for constitutional violations.

180. The State of Idaho has failed to ensure that all indigent criminal defendants receive meaningful and effective legal representation at all critical stages of the case, including at initial appearances, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

**Fourth Claim for Relief**
**Violation of Article 1, Section 13, of the Idaho Constitution (Due Process)**
**(All Plaintiffs and the Class against All Defendants)**

181. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of all preceding paragraphs.

182. Under Article 1, Section 13, of the Idaho Constitution, the State of Idaho is required to ensure that all indigent criminal defendants receive meaningful and effective legal representation at all critical stages of the case, including at initial appearances.

183. The State of Idaho has failed to ensure that all indigent criminal defendants receive meaningful and effective legal representation at all critical stages of the case, including at initial appearances, in violation of Article 1, Section 13, of the Idaho Constitution.

## RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

A) Certify this case as a class action pursuant to Rule 23 of the Idaho Rules of Civil Procedure;[48]

B) Declare that the State of Idaho is obligated to provide constitutionally adequate representation to indigent criminal defendants, including at their initial appearances;

C) Declare that the constitutional rights of Idaho's indigent criminal defendants are being violated by the State on an ongoing basis, and provide a deadline for the State to move this Court for approval of specific modifications to the structure and operation of the State's indigent-defense system;

D) Enjoin the State from continuing to violate the rights of indigent defendants by providing constitutionally deficient representation;

E) Enter an injunction requiring the State to propose, for this Court's approval and monitoring, a plan to develop and implement a statewide system of public defense that is consistent with the U.S. Constitution and the Constitution and laws of the State of Idaho;

F) Enter an injunction that requires the State to propose, for this Court's approval and monitoring, uniform workload, performance, and training standards for attorneys representing indigent criminal defendants in the State of Idaho in order to ensure accountability and to monitor effectiveness;

G) Enter an injunction barring the use of fixed-fee contracts in the delivery of indigent-defense services in the State of Idaho;

H) Award Plaintiffs and the Class reasonable attorneys' fees and costs incurred during the course of this litigation pursuant to 42 U.S.C. § 1988, I.C. § 12-117, the Private Attorney General doctrine and other applicable law; and

I) Grant any other relief the Court deems necessary and proper to protect Plaintiffs and the Class from further harm.

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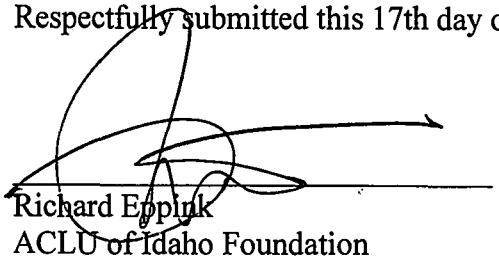
[48] Plaintiffs' motion for class certification, along with their supporting brief, have been filed with this court in conjunction with this complaint.

Respectfully submitted this 17th day of June, 2015.



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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STATE OF IDAHO, et al.,

Defendants.

Case No. CV OC 1510240

**AFFIDAVIT OF JEREMY PAYNE**

## AFFIDAVIT OF JEREMY PAYNE

STATE OF IDAHO )
: ss.
County of Gem )

I, Jeremy Michael Payne, having been duly sworn upon oath, depose and say:

1. My name is Jeremy Michael Payne. I am an adult and I live in Emmett, Idaho, Gem County.

2. I was arrested in Payette County on January 25, 2015, and charged with driving without a license and possession of a controlled substance and drug paraphernalia.

3. I was not represented by counsel my initial appearance, at which time the court set my bail at $30,000. I could not afford that bail amount, and as a result, I remained in custody until June 9, 2015.

4. I have only been able to meet with my attorney for a total of approximately 30-45 minutes since my case started. Most of those meetings occurred in or just outside the courtroom just prior to my court appearances.

5. I have repeatedly tried to reach my attorney by telephone, but have not been able to do so on any consistent basis. Between May 12 and May 26, 2015, I left at least six voice messages for my attorney, none of which were returned.

6. My lawyer hasn't been able to review discovery materials in my case with me.

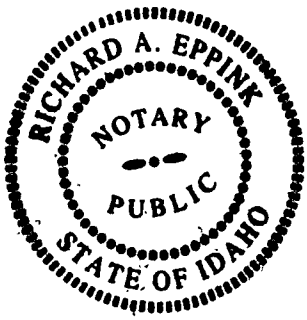
7. Even though I am scheduled to go to trial on July 21, 2015, it is my understanding that my attorney has not had the chance to conduct any investigation into my case, contact or summon any witnesses, hire an investigator, review and explain the relevant discovery materials to me, or discuss any trial strategies with me.

8. Everything I have stated in this affidavit is a fact I know personally. I will testify in person and under oath about these facts before this Court if I am called as a witness.

DATED this 15 day of June, 2015.

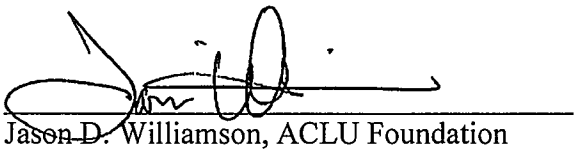
[redacted] JEREMY MICHAEL PAYNE

SUBSCRIBED AND SWORN before me this 15 day of June, 2015.




Notary Public for the State of Idaho
Residing at: Boise
My commission expires: 2/24/2021

DATED this 16 day of June, 2015.



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Richard Eppink, ACLU of Idaho Foundation

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Plaintiffs,

vs.

STATE OF IDAHO, et al.,

Defendants.

CV OC 1510240

Case No. _____

**AFFIDAVIT OF NAOMI MORLEY**

## AFFIDAVIT OF NAOMI MORLEY

STATE OF IDAHO )
: ss.
County of Boise )

I, Naomi Morley, having been duly sworn upon oath, depose and say:

1. My name is Naomi Morley. I am an adult and I live in Garden Valley, Idaho, in Boise County.

2. I was arrested in Ada County on March 14, 2014, following a serious single-car accident in which I was seriously injured.

3. I have been charged in Ada County with driving under the influence and possession of controlled substances and paraphernalia.

4. I was assigned a public defender, and I am currently represented by an appointed conflict attorney.

5. Although I think there was a lawyer at my initial appearance on these charges, I do not remember having any opportunity to consult with that lawyer. The court set my bail at $15,000 at that time. I could not afford that bail amount, and so I remained in the Ada County Jail until my bail was reduced three weeks later, even though I had been severely injured in the car accident.

6. My appointed lawyers have been unable to provide me with adequate representation. If I want to retain an expert to challenge the State's contentions about the alleged presence of drugs in my system at the time of the accident, or any other outside testing, I have to pay for such services myself, I was previously informed.

7. I also have had to track down my own witnesses. Despite informing my lawyer that another person would confess responsibility, it was only through my own efforts that I recently obtained a sworn affidavit from the person, acknowledging responsibility.

8. Also, after preparing an extensive analysis of discrepancies in the state's investigation, I gave it to my lawyer but was informed that he did not even look at it. And the vehicle involved in the crash was apparently scrapped by the state, and my lawyer did not inspect it before it was destroyed.

9. I have also been unable to communicate effectively or consistently with my lawyer. I am worried that my lawyer is pressuring me to plead guilty because he does not have the time or resources to prepare sufficiently for trial. I have turned down a plea offer that would have required me to spend 10 years in prison. I am scheduled to go to trial on June 29, 2015.

10. Everything I stated in this affidavit is a fact I know personally. I will testify in person and under oath about these facts before this Court if I am called as a witness.

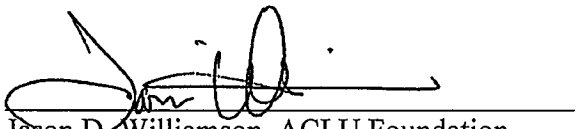
DATED this 13 day of June, 2015.

Naomi Morley

SUBSCRIBED AND SWORN before me this 13th day of June, 2015.


Notary Public for the State of Idaho
Residing at: Boise
My commission expires: 2/24/2021

DATED this 16 day of June, 2015.



Jason D. Williamson, ACLU Foundation

Richard Eppink, ACLU of Idaho Foundation

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Plaintiffs,

vs.

STATE OF IDAHO, et al.,

Defendants.

Case No. CV OC 1510240

**AFFIDAVIT OF JASON SHARP**

# AFFIDAVIT OF JASON SHARP

STATE OF IDAHO )
: ss.
County of Shoshone )

I, Jason Monroe Sharp, having been duly sworn upon oath, depose and say:

1. My name is Jason Monroe Sharp. I am an adult and I live in Kellogg, Idaho, Shoshone County.

2. I was arrested in Shoshone County on May 16, 2014, and charged with burglary and grand theft.

3. I was not represented by counsel my initial appearance on May 20, 2014, at which time the court set my bail at $50,000. I could not afford that bail amount, and as a result, I remained in custody until May 29, 2014.

4. After I explained to the court, without the assistance of my lawyer, that I was not on probation at the time of my arrest, as the judge believed, the court reduced my bail to $5,000. I still was unable to afford to pay my bail, however, and remained in custody.

5. Fearing that I might lose my job if I remained in jail, I contacted my employer, without the assistance of my lawyer, and asked that he write a letter to the court supporting my request to be released on my own recognizance. After receiving the letter of support from my employer, the court released me from jail on my own recognizance.

6. I have only been able to meet with my attorney for a total of approximately one hour throughout the 13 months during which my case has been pending. Most of the meetings I have had with my lawyer have occurred in or just outside the courtroom prior to my court appearances.

7. I have also has been unable to review the discovery in my case, despite repeated requests to do so.

8. Even though I am scheduled to go to trial on July 14, 2015, it is my understanding that my attorney has not had the chance to conduct any investigation into my case, contact or summon any witnesses, hire an investigator, review and explain the relevant discovery materials to me, or discuss any trial strategies with me.

9. Everything I have stated in this affidavit is a fact I know personally. I will testify in person and under oath about these facts before this Court if I am called as a witness.

DATED this 16 day of June, 2015.

Jason Monroe Sharp

SUBSCRIBED AND SWORN before me this 16 day of June, 2015.

Notary Public for the State of Idaho
Residing at: Mullan
My commission expires: 10/25/17

HEATHER LITZ NOTARY PUBLIC STATE OF IDAHO

DATED this 16 day of June, 2015.

Richard Eppink, ACLU of Idaho Foundation

Jason D. Williamson, ACLU Foundation

Kathryn M. Ali
Jenny Shen
Bret Ladine, Hogan Lovells US LLP

*Attorneys for the Plaintiffs*

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Defendants.

Case No. CV OC 1510240

**AFFIDAVIT OF TRACY TUCKER**

# AFFIDAVIT OF TRACY TUCKER

STATE OF IDAHO )
: ss.
County of Bonner )

I, Tracy Don Tucker, having been duly sworn upon oath, depose and say:

1. My name is Tracy Don Tucker. I am an adult and I live in Sandpoint, Idaho, Bonner County.

2. I was arrested in Bonner County on March 6, 2015, and charged with attempted strangulation and domestic battery in the presence of a child.

3. Although I was appointed a public defender at my initial appearance before the court on March 9, 2015, I was not represented by counsel at that appearance, at which time the court set my bail at $40,000. I could not afford that bail amount, and as a result, I remained in the Bonner County Jail until June 2, 2015.

4. The attorney assigned to my case did not appear on my behalf at my arraignment on March 18, 2015. Instead, a substitute attorney with no prior knowledge of my case or even the charges against me. The substitute attorney failed to seek a bond reduction at my arraignment.

5. My appointed lawyer has been unable to provide me with adequate representation. Between March 9 and June 1, 2015, I was only able to meet with my attorney on three occasions: once, when my attorney came to Bonner County Jail and met with me for approximately 10 minutes, and two additional times when I saw my lawyer in court. My attorney did not meet with me prior to either of those court proceedings—not even in the courtroom prior to the proceedings.

6. During the three months I was in custody, I spoke with my public defender on the phone only on two occasions, both for approximately five minutes. Between March 18, 2015 and June 1, 2015, I attempted, unsuccessfully, to reach my attorney by phone at least 50 times.

7. As of June 8, 2015, ten days prior to my original trial date, it is my understanding that my attorney had not conducted any investigation into my case, contacted or summoned any witnesses, or hired an investigator. My attorney also did not review or explain the discovery materials in my case, or discuss potential trial strategies with me.

8. On June 2, 2015, I pleaded guilty to attempted strangulation and was released from custody the same day. I am scheduled to be sentenced on August 3, 2015.

9. Everything I have stated in this affidavit is a fact I know personally. I will testify in person and under oath about these facts before this Court if I am called as a witness.

DATED this 15 day of June, 2015.

Tracy Tucker
Tracy Don Tucker

SUBSCRIBED AND SWORN before me this 15 day of June, 2015.

LINDA SUE ELSA NOTARY PUBLIC STATE OF IDAHO

Notary Public for the State of Idaho
Residing at: Sandpoint, ID
My commission expires: 08/05/2017

DATED this 16 day of June, 2015.

Richard Eppink, ACLU of Idaho Foundation

Jason D. Williamson, ACLU Foundation

Kathryn M. Ali
Jenny Shen
Bret Ladine, Hogan Lovells US LLP

*Attorneys for the Plaintiffs*

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CV OC 1510240

Case No. _____

**FIRST AFFIDAVIT OF RICHARD EPPINK**

## FIRST AFFIDAVIT OF RICHARD EPPINK

STATE OF IDAHO )
: ss.
County of Ada )

I, Richard Eppink, having been duly sworn upon oath, depose and say:

1. I am one of the attorneys for the plaintiffs in this case.
2. **Exhibit A** to this affidavit is a true copy of the Idaho State Public Defense Commission, 2015 Report to the Legislature, obtained from Ian Thomson, Executive Director of the Public Defense Commission.
3. **Exhibit B** to this affidavit is a true copy of the Payette County Public Defender Contract for 2014-2016, obtained through a Public Records Law request on about October 6, 2014.
4. **Exhibit C** to this affidavit is a true copy of the Gem County Public Defender Contract for, obtained through a Public Records Law request on about October 2, 2014.
5. **Exhibit D** to this affidavit is a true copy of the Custer County Public Defender Contract, obtained through a Public Records Law request on about October 22, 2014.
6. **Exhibit E** to this affidavit is a true copy of the Franklin County Public Defender Contract, obtained through a Public Records Law request on October 21, 2014.
7. **Exhibit F** to this affidavit is a true copy of a report I received from Justin Curtis, an attorney who I understand works in the office of the Idaho State Appellate Public Defender and is a member of a subcommittee of the Idaho Criminal Justice Commission that is investigating pre-trial justice in Idaho. I understand from Mr. Curtis that this list represents the results of a survey he conducted for the subcommittee about which Idaho counties provide counsel at the time of arraignment to defendants who cannot afford an attorney. I received this list by email from Mr. Curtis on April 21, 2015.

8. I have reviewed the current clients, former clients, and other matters I am handling and have handled in the past to determine whether I may have any professional conflict of interest or potential conflict of interest that might inhibit my ability to represent a class of all indigent defendants in Idaho. I have also considered the information that I am aware of, including confidential and privileged information, concerning the named plaintiffs and proposed class representatives of that class to determine whether there may be a conflict of interest or potential conflict of interest between class representatives or between any class representative and any absent class member. I have not identified any potential conflict of interest that I believe would prevent me from fairly and adequately representing the class or that would prevent the proposed class representatives from serving as class representatives for the absent class members.

9. I am admitted to practice before Idaho state courts, the U.S. District Court for the District of Idaho, and the U.S. Court of Appeals for the Ninth Circuit. I have served as lead counsel or the only handling attorney in major litigation in areas of significant public interest or developing law, in both state and federal court, including in class actions. I am currently the Legal Director of the American Civil Liberties Union of Idaho Foundation and practice exclusively in the areas of constitutional and civil rights law and policy with major societal significance.

DATED this 16th day of June, 2015.

Richard Eppink

SUBSCRIBED AND SWORN BEFORE ME this 16th day of June, 2015.

INGRID ANDRULIS
Notary Public
State of Idaho

Ingrid Andrulis
Notary Public for Idaho
Residing at: Boise
My commission expires: 4-22-2019

2015

# REPORT TO THE LEGISLATURE

IAN H. THOMSON

*EXECUTIVE DIRECTOR*

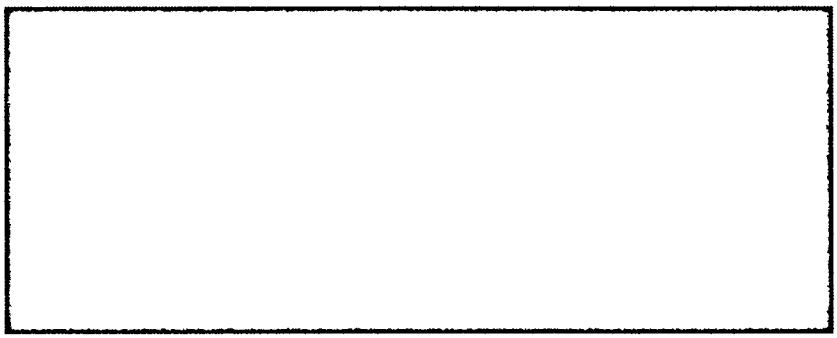
IDAHO STATE PDC PUBLIC DEFENSE COMMISSION

PUBLIC DEFENSE COMMISSION | 816 W. Bannock St., Suite 201 Boise, ID

EXHIBIT A

# Table of Contents





# I. SUMMARY

The State Public Defense Commission (PDC) was recently established[1] as a means to improve the delivery of indigent legal defense services throughout Idaho. The mission of the Commission is to seek and preserve freedom for all by vigorously safeguarding Constitutional rights. In the words of Thomas Jefferson, "The price of freedom is eternal vigilance." In that effort, the Commission aims to:

(A) serve as a **clearing house of information** for relevant stakeholders;

(B) maintain standards to ensure that defending attorneys have adequate **training and resources** to fulfill their Sixth Amendment obligations;

(C) **promulgate rules** for public defender training and data collection regarding indigent defense services;

(D) **inform the legislature** of any Sixth Amendment issues.

In a very short period, the Commission has established an office, held regular meetings, begun to assess the collection of relevant data, and identified its immediate priorities for its first year of operation. Consequently, the members of the Commission are engaged in developing recommended model contract terms and constructing rules and regulations regarding public defender training and qualifications.

**STATE PUBLIC DEFENSE COMMISSION**

- GATHER INFORMATION
- PROVIDE TRAINING
- ISSUE RULES & STANDARDS
- INFORM LEGISLATURE

[1] For a brief discussion of the relevant background leading to the creation of the State Public Defense Commission, *see* Supplemental Material at pp.13-15, included at the end of this report.

# II. APPOINTMENT OF MEMBERS

According to statute, all appointed members of the Commission are voluntary and serve part-time. The following Commissioners were appointed upon the creation of the Commission in July of 2014:

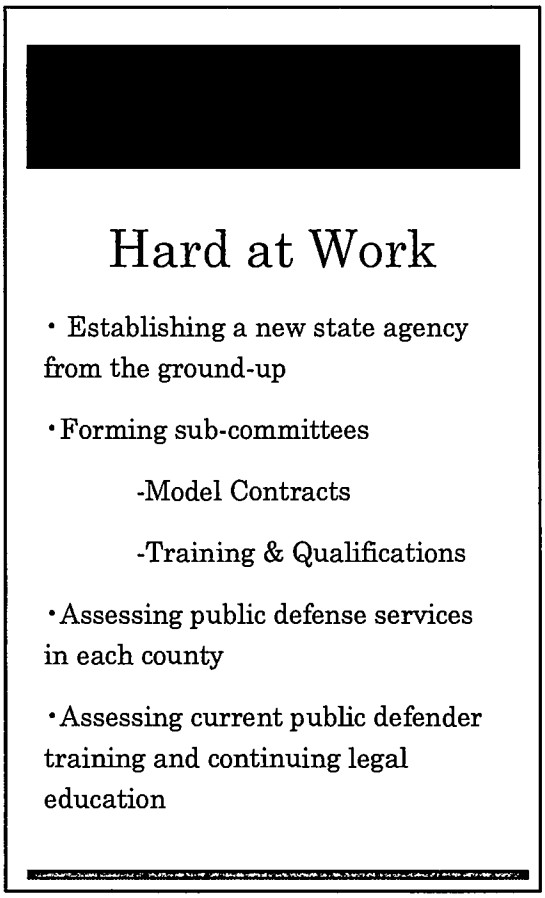
| Member | Appointment Authority | Term |
|---|---|---|
| **Sen. Chuck Winder**<br>Senate | President Pro Tempore of Senate | Elected Term ≤ 2 years |
| **Rep. Jason A. Monks**<br>House of Representatives | Speaker of the House of Representatives | Elected Term ≤ 2 years |
| **Hon. Molly Huskey, Chair***<br>District Court Judge, Third District | Chief Justice of Supreme Court | 2 years |
| **Comm. Kimber Ricks**<br>Idaho Association of Counties | Governor | 3 years |
| **William H. Wellman, Esq.**<br>Owyhee County Public Defender | Governor | 3 years |
| **Sara B. Thomas, Esq.**<br>State Appellate Public Defender | Governor | 3 years |
| **Darrell G. Bolz, Vice-Chair***<br>Idaho Juvenile Justice Commission | Governor | 3 years |

* Both the Chair and Vice-Chair serve terms of a single year.

# III. ACCOMPLISHMENTS OF THE COMMISSION

The Commission met for the first time on August 27, 2014. Given the obvious challenges in creating a new agency and meeting its statutory obligations, the Commission has met a total of nine times in the intervening four and a half months. In that time the Commission has selected a chair and vice-chair for its first year of operation, drafted bylaws, and adopted a mission statement, vision statement and statement of values.

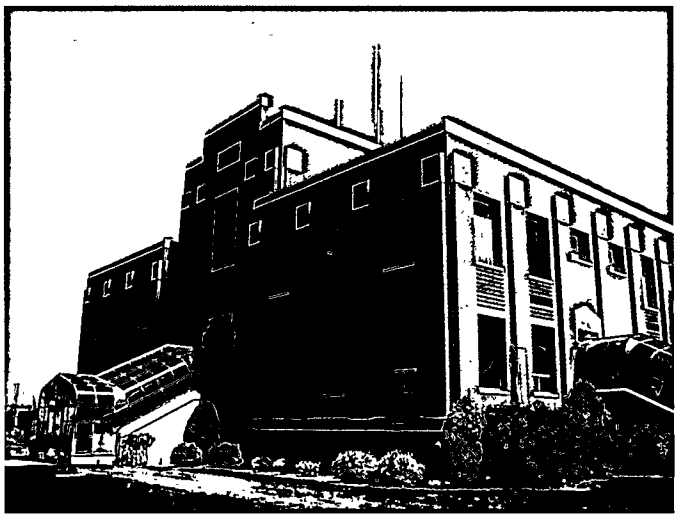
In accordance with statute, the Commission hired a full-time Executive Director, Ian Thomson, to handle the day-to-day operations of the Commission. He began working for the Commission in October. Prior to joining the Public Defense Commission, Mr. Thomson worked in the Capital Litigation Unit at the Idaho State Appellate Public Defender. Previously he worked as a trial-level public defender for several years. The Commission also obtained office space and hired a part-time administrative assistant. In establishing a new state agency, the Commission has contracted with other state agencies and private contractors to provide necessary services and support for the creation and maintenance of the office.




The Commission identified its statutory priorities and formed two primary **subcommittees**: one to explore **model contract terms** for use by the various counties, and the other to devise administrative rules regarding public defender **training and qualifications**. The entire membership of the Commission also agreed to work on data reporting requirements throughout the first year.

# Public Defense Delivery Assessment

The Commission has made a complete assessment of the way in which each county in Idaho provides for indigent defense services. Accompanying that information, the Commission has generated a comprehensive public defender roster, consolidating contact information for every institutional public defender, contract defending attorney, and contracted conflict public defender across Idaho.



Cassia County Courthouse

By statute there are four approved means for providing Sixth Amendment counsel to those who qualify[2]: (1) a county can establish and maintain an institutional **public defender office**, (2) more than one county can **jointly establish** and operate an institutional public defender office, (3) a county can **contract with the public defender office** of another county for services, or (4) a county can choose to **contract with private practitioners** to act as the defending attorneys for those who qualify.

The following is a brief synopsis of the methods of delivery being used in the various counties throughout Idaho.

## INSTITUTIONAL PUBLIC DEFENDER OFFICES

**Seven** (7) counties have now chosen to establish and maintain a public defender office. (Ada, Bannock, Bonner, Bonneville[3], Canyon[4], Kootenai, and Twin Falls counties.)

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[2] Idaho Code §19-859(1)-(4).

[3] Bonneville County also created a separate Office of the Conflict Public Defender in 2014, which employs two full-time attorneys to handle cases conflicted out of the primary office.

[4] The Canyon County Public Defender was only established in 2014, and began operation on October 1st.

Those offices currently employ a combined total of 115 full-time attorneys to handle the majority of the indigent cases in their respective counties. Between those offices, the PDC has identified another forty-one (41) attorneys that are used to handle conflict cases.

JOINTLY OPERATED PUBLIC DEFENDER OFFICES

Only **two** (2) counties have opted to enter into a joint operating agreement, in order to pool resources together and establish an office of the public defender. (Cassia and Minidoka counties.) A joint management board, with members from each county, has been arranged to handle the finance and maintenance of the office.

The Mini-Cassia Public Defender currently employs five (5) full-time public defenders and operates a small office in each respective county.

COUNTIES CONTRACTING WITH OUTSIDE PUBLIC DEFENDER OFFICES

No county in Idaho is currently contracting with an outside institutional public defender office to provide Sixth Amendment representation.

COUNTIES WITH PRIVATE ATTORNEY CONTRACTS

**Thirty-four** (34) counties are currently under contract with one or more attorneys in private practice to provide representation for those who qualify. (Adams, Bear Lake, Benewah, Bingham, Blaine, Boise, Boundary, Butte, Camas, Caribou, Clark, Clearwater, Custer, Elmore, Franklin, Fremont, Gem, Gooding, Idaho, Jefferson, Jerome, Latah, Lemhi, Lewis, Lincoln, Madison, Nez Perce, Oneida, Owyhee, Payette, Power, Shoshone, Teton, and Valley counties.)

Between those thirty-four (34) counties, there are fifty-three (53) separate contracts involving sixty-seven (67) different attorneys who are engaged in providing services. The Commission has also identified an additional six (6) attorneys that have conflict-specific contracts in those counties, and another two (2) who frequently serve as a conflict attorney without the benefit of a contract.

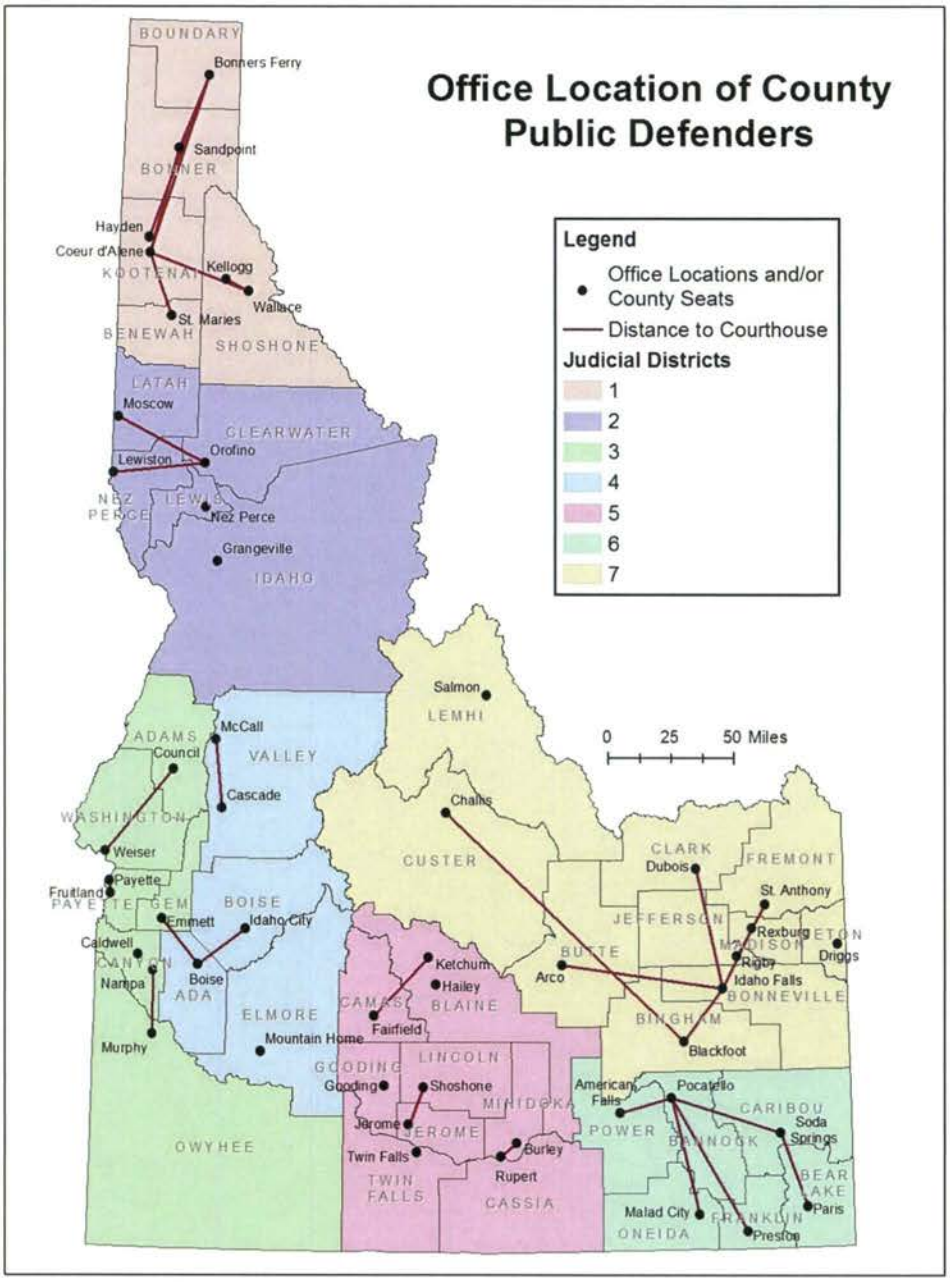
There is **one** county (Washington) that has neither a public defender office nor an existing contract for the provision of indigent defense services. The Commission has identified seven (7) attorneys who are most frequently appointed by the sitting judge to handle those cases on an ad hoc basis.

| Type of Service | Number of Counties | Number of Attorneys |
|---|---|---|
| County Institutional Public Defender Office | 7 | 115 |
| Jointly Operated Public Defender Office | 2 | 5 |
| Contract Defending Attorney | 34 | 67 |
| Contract Conflict Defending Attorney[5] | 10 | 47 |

Felony and capital appeals in forty-three (43) counties are handled by the office of the State Appellate Public Defender.[6] The State Appellate Public Defender currently employs a staff of sixteen (16) attorneys, and uses the services of three (3) private appellate lawyers to handle felony conflicts. According to the Commission's most recent assessment, there are 136 full-time attorneys employed at institutional public defender offices at the trial and appellate level in Idaho. Another sixty-seven (67) work under a contract with one or more counties, and another fifty-nine (59) serve as either contract conflict-defense attorneys or are frequently used as appointed attorneys to handle similar matters.

The Commission has also discovered that half of Idaho's counties (twenty-two) are being served by contract defending attorneys whose principal office is located outside of the county. (*See* figure below.)

[5] Six counties with institutional public defender offices, along with four contract counties, have entered into specific contracts for conflict services.
[6] All counties, except for Jefferson County, have chosen to participate and contribute to the state funds which qualifies them for these services.




## Legal Education and Training Assessment

The Commission has undertaken a concerted effort to identify those attorneys who are in the greatest need of additional training, support, and resources. In anticipation of planning training programs for public defenders, the

Commission has completed an initial assessment of the amount and source of the mandatory continuing legal education (MCLE) credit hours obtained by each public defender in their current reporting period. That initial assessment confirms that a significant number of indigent defense attorneys in the State are not receiving adequate training hours in areas directly relevant to the representation of their indigent clients.

The Commission has joined 186 attorneys serving as public defenders in Idaho to the National Association for Public Defense (NAPD), which provides attorneys with significant online resources. Particularly for attorneys who practice alone, or are located in more remote areas, online resources can provide a substantial and cost-effective method to provide guidance and support.

# IV. Identified Priorities of the Public Defense Reform Interim Committee

During its first few months of operation, the Commission was tasked with certain clear priorities by the joint Public Defense Reform Interim Committee. Those objectives included the development of model contract terms to serve as guidelines to the counties with private contracts, and the provision of relevant training to public defenders in the current fiscal year.

The Commission has adopted the priorities of the Interim Committee, and due to limited time and resources the State Public Defense Commission is not submitting any legislative recommendations for public defense reform at this time. The Commission feels strongly that significant reforms in the absence of clear and reliable data and information would be a disservice to all of those involved. The Commission will be looking toward the implementation of Odyssey (the statewide court technology software) to provide better information on caseload and workload of those attorneys representing defendants at county expense. That program represents a $21 million investment by the State into improving effective case management throughout the criminal justice system. However, as Administrative

District Judge Richard Bevan recently reported to the House Judiciary, Rules & Administration Committee, the statewide implementation of Odyssey is not likely to be completed until 2017.

## Model Contract Terms and Public Defender Standards

The Commission has undertaken a serious study of the nature and composition of contracts being used by counties throughout Idaho. They have begun their review of other model contracts, and are progressing quickly in identifying those terms that are necessary to ensure that counties can provide representation with financial or ethical conflicts, and still take into consideration the particular circumstances of the individual counties. At the same time these contract provisions should provide the attorney with adequate protections and financial compensation for the work being provided to their clients.

The Commission expects to present recommended model contract terms in the upcoming year and to have those available to the counties by the time existing contracts expire in the fall of 2015. In addition, the Commission will be submitting proposed rules for adoption and approval regarding the qualifications of contracted public defenders and training requirements for those attorneys handling indigent appointments.

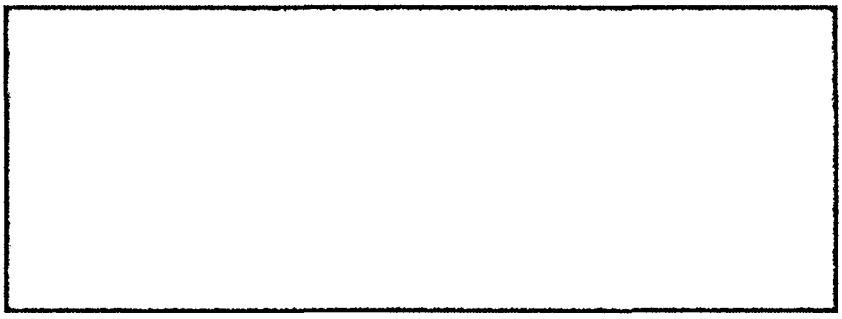
## Full Utilization of Trustee and Benefit Payments

The Commission is fully aware that its trustee benefit payment allocation has been set-aside specifically for the training of indigent defense attorneys across the state. In addition to providing attorneys with online resources through the NAPD, the Commission is planning to host and sponsor three distinct training conferences before the end of the 2015 fiscal year, at little or no cost to those who attend. A primary conference for trial- and appellate-level public defenders is scheduled for June 4-5 in Caldwell, which will accommodate up to 155 attorneys. An additional capital training will be held in Coeur d'Alene on June 12th for up to

twenty-five (25) attorneys. Furthermore, a specialized training for attorneys who handle juvenile and child-protection cases is planned in Boise on May 29th for another twenty (20) attorneys. Those trainings are expected to fully exhaust the money allocated for trustee benefit payments in the current year.

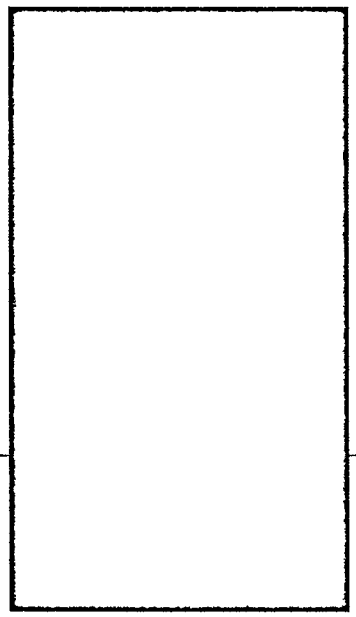
## Outreach and Education

Finally, the Commission is engaged in important information gathering and public education with respect to the public defense function. In accordance with those aims, representatives of the Commission have already made considerable efforts to meet with chiefs of the institutional public defender offices across the state, several contract attorneys, county commissioners, and a limited number of prosecuting attorneys. The Commission will continue to strive to inform the relevant stakeholders about the Commission's role, the guidance it can provide to county commissions, and the support it can offer to defense attorneys representing Idaho's indigent population.



# V. CONCLUSION

The State Public Defense Commission is determined and committed to improving the quality and effectiveness of indigent representation in every county of Idaho. The Commission also acknowledges that there is clear room for reform and improvement. Although an assessment has begun, given the diversity of the current public defense system and the diffuse nature of its administration, the challenges faced in collecting data from each county, and the difficulty in implementing model contract terms, a more robust analysis of each county's system will take a considerable amount of time. Consequently, the Commission believes that it will require additional time and study before making legislative recommendations involving substantive and systemic reform.



# SUPPLEMENTAL MATERIALS

## HISTORY AND BACKGROUND OF THE IDAHO STATE PUBLIC DEFENSE COMMISSION

In 2008 the Idaho Criminal Justice Commission (CJC), along with the Juvenile Justice Commission, requested the National Legal Aid and Defender Association (NLADA) conduct a comprehensive analysis and evaluation of the provision of indigent defense across the state of Idaho at the trial-level. Over the course of a year, the NLADA sent evaluators to seven representative counties throughout the state, including Ada, Blaine, Bonneville, Canyon, Kootenai, Nez Perce, and Power.

The NLADA issued their final report in January 2010, entitled, *The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Court (Evaluation of Trial-Level Indigent Defense Systems in Idaho.* The report concluded

> [T]he state of Idaho fails to provide the level of representation required by our Constitution for those who cannot afford counsel in its criminal and juvenile courts. By delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight, Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qualifies for services and in the level of competency of the services rendered. While there are admirable qualities of some of the county indigent defense services, NLADA finds that none of the public defender systems in the sample counties are constitutionally adequate.

At the same time the NLADA was conducting their analysis of Idaho's system, the CJC created its own Subcommittee on Public Defense in December of 2009. The CJC's subcommittee included representatives from the Idaho Association of Counties, the state court system, the Attorney General's office, county prosecutors, judges and magistrates, legislators, attorneys, public defenders, and the Department of Corrections. That group undertook its own study of the public defense system over the course of three and a half years.

The CJC's subcommittee made several legislative recommendations, including (1) a revision of state statute addressing the definition of indigency, and clarifying when a person or child qualifies for legal representation at county expense, (2) a clarification of when a single attorney can serve as a guardian and attorney in the same matter, (3) the establishment of standards for juvenile representation, and (4) the creation of a legislative Interim Committee to explore public defense reform. Largely in response to those recommendations, the joint legislative Public Defense Reform Interim Committee was created in the 2013 session and was extended through 2014.

## ESTABLISHMENT OF THE STATE PUBLIC DEFENSE COMMISSION

During the 2014 session the Legislature established the State Public Defense Commission, as a self-governing agency of the Executive branch. The Commission's charter is codified in Idaho Code §19-848 through §19-850. The Commission was established on July 1st, 2014.

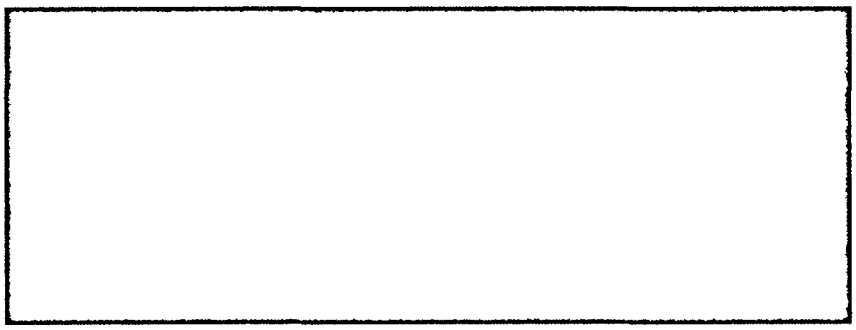
The statutory mandate and authority of the PDC was clearly set forth in I.C. §19-850(a) and (b). The PDC has been charged with the following:

(1) Promulgate rules with regards to

a. Training and continuing legal education requirements (CLE) for indigent defense attorneys, including criminal, capital, post-conviction, juvenile, abuse and neglect, civil commitments, and civil contempt;
b. Uniform data reporting requirements for the annual reports that indigent defense attorneys must submit to their county commissions and administrative judge, including caseload, workload and expenditures.

(2) Make recommendations to the Idaho legislature regarding the public defense system (by January 20 of each year), including
a. Core contract requirements for counties to use when engaging services of private attorneys (including model contracts);
b. Qualifications and experience standards for indigent defense attorneys;
c. Enforcement mechanisms;
d. Funding issues, including for trainings, data collection and reporting, and handling conflict cases.

The Legislature approved an initial annual budget of $300,000. Of that $119,900 was appropriated for personnel costs, $74,200 was dedicated to general operating expenses, and $105,900 was dedicated as trustee benefit payments for public defender training costs.



OFFICE OF
**Clerk of the District Court**
FOR PAYETTE COUNTY, IDAHO

BETTY J. DRESSEN
CLERK AND EX-OFFICIO
AUDITOR AND RECORDER

1130 3RD AVENUE N., ROOM 104
PAYETTE, IDAHO 83661-2473

October 6, 2014

American Civil Liberties Union
Jason D Williamson
125 Broad St., 18th Floor
New York, NY 10004

Dear Mr. Williamson:

In reply to your public records request dated September 26, 2014 we have enclosed the closed contracts and the new contracts for Public Defense. If you have any questions please contact my office at 208-642-6000.

Sincerely,

Betty J Dressen

Betty J. Dressen
Payette County Clerk

**EXHIBIT B**

**AGREEMENT BETWEEN PAYETTE COUNTY, IDAHO AND PHILLIP B. HEERSINK FOR THE PROVISION OF SERVICES OF PUBLIC DEFENDER**

The County of Payette, State of Idaho, a political subdivision authorized to enter into agreements and contracts by Idaho law, acting by and through its Board of County Commissioners enters into the following agreement with Phillip B. Heersink, Attorney at Law of Fruitland, Idaho, for the purpose of providing legal representation to indigent persons in Criminal and Quasi-criminal cases in Payette County, for the period of **October 1, 2014 to September 30, 2016.**

Hereinafter, Payette County will be referred to as the "COUNTY" and Phillip B. Heersink will be referred to as the "CONTRACTOR". The parties agree as follows:

1 This agreement shall be for all services and expenses of a public defender for Payette County for the calendar years stated above, excluding extraordinary expenses as may be determined by the parties to this agreement. Such extraordinary expenses shall be determined through negotiations between the parties and shall be authorized only upon written agreement of both parties or in accordance with Paragraph 11.

2. The COUNTY agrees to pay to the CONTRACTOR for the term above described, sums to be payable as follows:

A. CONTRACTOR agrees to dedicate whatever days per month are necessary to provide the full services required hereunder to working on matters he is appointed to under this Agreement. The days that CONTRACTOR performs under this Agreement will be defined as "Public Days." A Public Day is any day in which CONTRACTOR must appear in Court for a client he is appointed to under this Agreement, or any day in which CONTRACTOR works for 5 or more hours on clients he is appointed to under this Agreement. There is not a limit to the number of days that CONTRACTOR may use as Public Days in any given month, due to the requirement of CONTRACTOR to provide the legal services agreed to herein.

B. For each Public Day that CONTRACTOR works, the COUNTY will pay him $560.00.

C. The CONTRACTOR shall provide an invoice on the first day after the 14th of each month that the Courts are open in the COUNTY ("Working Day"), and another on the first Working Day after the 28th of each month. That invoice will identify the Public Days worked in the period after the last invoice.

D. The COUNTY shall pay the amounts claimed in said invoice within seven (7) days of receipt of the invoice.

3. CONTRACTOR hereby agrees that he shall practice law independently of any contractor under a separate public defender contract with Payette County (hereinafter "SEPARATE CONTRACTOR"), in order to avoid conflicts in representations of their respective clients. The County shall be responsible for paying no other amounts except as provided for under the terms of this contract.

4. In exchange for the payment by the COUNTY the CONTRACTOR agrees to be available full time and provide the criminal and quasi-criminal defense services for those persons determined by the Court to be indigent in the following cases:

A. All felony cases, including felony probation violations. This paragraph shall not include cases where the CONTRACTOR has a conflict due to a prior appointment under this contract or the previous agreement.

B. All misdemeanor cases in which the SEPARATE CONTRACTOR has a conflict in representation, including probations violations.

C. All juvenile charges in which the SEPARATE CONTRACTOR has a conflict in representation, including probation violations.

D. Representation of at least one indigent parent, if necessary, or the Guardian ad Litem, in Child Protective Act, including those child protection cases currently assigned to CONTRACTOR.

E. All probation violations where, in the discretion of the Court, the Public Defender should be appointed to represent the probationer rather than the attorney who represented the defendant in the prior criminal proceedings in which the probation was entered.

F. In all other cases in which the State of Idaho is a party, in which it is the determination of the trial court that it is appropriate that an attorney be appointed to represent an indigent party.

G. Appeals from the Magistrate Court to the District Court.

H. Post Conviction cases as assigned by the Court.

I. All cases which are currently assigned to CONTRACTOR pursuant to any previous agreements/

J. All services not herein listed but which are listed in specifications for bids which were submitted to Betty Dressen, County Clerk in response to her solicitation for such bids in 2008.

5. CONTRACTOR shall maintain an office in Payette County. The CONTRACTOR shall be responsible to pay CONTRACTORS own expenses, i.e., office space; telephone service; necessary supplies; Workman's Compensation Insurance, malpractice insurance and the like. CONTRACTOR shall keep the above referenced office generally open to the public from 9:00 a.m. to noon and 1:00 p.m. to 5:00 p.m. Monday thru Thursday and Fridays from 9:00 a.m. to 12:00 noon excepting holidays observed by Payette County. Further, CONTRACTOR agrees to be generally available at the above referenced office during regular business hours except as the court calendar, vacation, illness, and other absences may preclude.

6. All professional legal personnel assisting the CONTRACTOR in performing under this contract shall be employees or contract personnel with the CONTRACTOR. They shall not be employees of Payette County and no benefits shall be expended for them by the County. It is clearly understood and agreed by both parties to this contract that the relationship established by this contract is that of independent contractor. The CONTRACTOR agrees that he is an independent contractor and as such has the sole employment and personnel relationship with any professional legal staff serving him and performing the services under this contract.

7. The COUNTY shall provide representation for additional conflicts should they occur, except to the extent that said conflict exists due to CONTRACTOR'S private practice. To the extent CONTRACTOR cannot represent a Defendant in any particular matter where the public defender is appointed due to a conflict that exists due to CONTRACTOR'S private practice, the expenses for such representation shall be deducted from the monthly payments provided for herein as they are incurred.

8. The CONTRACTOR shall provide to the COUNTY, in timely fashion, all reports required by the Idaho Code, and shall further file any other reports relating to the operation of his office reasonably requested by the County in its efforts to maintain an efficient criminal justice system. It is understood by both parties to this agreement that the reports requested by the COUNTY shall not include information which would violate the individual constitutional rights of the indigent persons being represented by the CONTRACTOR.

9. Should this contract not be renewed, all cases which have been assigned to the CONTRACTOR by the end of the Contract term, i.e., September 30, 2014, and which cannot be reasonably assigned to a new attorney, shall be handled as a "Hold-Over" case by the CONTRACTOR at the rate of $85.00 per hour. On each case which is a "hold-over" upon completion of the contract the CONTRACTOR will bill and itemize services performed. Any case which is open at the end of the contractual term but which is open only for the purpose of awaiting sentence or entry of final plea will not be included as a billable, "hold-over case" and there will be no extra charge made by the CONTRACTOR. Provided, however, if the contract is not renewed but not assigned to another attorney, the contract shall automatically renew on a month to month basis.

10. The parties to the contract agree that in the event a special circumstance offense arises the two parties will negotiate to determine whether a supplemental agreement is necessary. For these purposes a "special circumstance" offense would be a homicide case wherein the state seeks the death penalty. In such case, where perhaps more than two or more separate attorneys would have to become involved, extraordinary expenses might be necessary.

11. This contract does not include any costs of transcripts, or any expenses of trial, investigation or appeal for which the Court may approve expenditures It is understood by CONTRACTOR that there are limited funds placed in other budget line items that have been created by COUNTY which may be drawn upon by CONTRACTOR for such expenses, or other expenses related to the defense of indigent clients, such as investigators, expert witnesses, or necessary travel expenses. CONTRACTOR may draw on such funds by obtaining advane approval for such expenses from the district judge or magistrate having jurisdiction over the case; provided, however, that in no event shall COUNTY be liable or responsible for any costs or expenses for any appeals for other proceedings that fall within the jurisdiction of the State Appellant Public Defender's office pursuant to Idaho Code 19-867, et. Seq., and as amended.

12. This agreement can be terminated by either party at any time during the term thereof by giving thirty (30) days notice of such intention in writing and delivered by certified mail. Provided, however, this agreement may be modified or cancelled should the state or federal legislature or courts of proper jurisdiction require a modification of Payette County's public defender services. Further, if it becomes clear to CONTRACTOR that these terms do not provide adequate resources for him to perform his full duties hereunder, he may seek to renegotiate the said terms with the COUNTY by scheduling a meeting with the Board of County Commissioners.

13. Wherefore, in the interest of providing for Payette County the most efficient possible defense services for those indigents declared to be needy of criminal defense services by the Courts, the COUNTY and the CONTRACTOR enter into the above agreement.

Dated this 25th day of August, 2014.

Marc Shigeta, Chairman
Payette County Commissioners
County of Payette, State of Idaho

ATTEST:

Betty J. Dressen, Clerk

Dated this 25th day of August, ~~2013~~ 2014.

PHILLIP B. HEERSINK, Attorney at Law

CONTRACTOR

# SPECIFICATIONS FOR THE PAYETTE COUNTY PUBLIC DEFENDER CONTRACT

**It shall be the duty of the Payette County Public Defender(s) to provide representation for the following matters:**

1. All city and county misdemeanors
2. All felonies
3. Representation of the parent, or both parents if there is no conflict, and the child/guardian ad litem in child protection actions
4. Persons held on mental holds
5. Juveniles
6. Post conviction relief
7. Conflicts for one (1) co-defendant in all misdemeanor and felony cases
8. All appeals which originate in magistrate or district court, subject to the jurisdiction of the State Appellate Public Defender
9. All cases and matters pending with the current Payette County Public Defender at the time the new contract period begins
10. Second chair in any capital case (The second chair shall not be compensated any additional funds)

**Other duties:**

Certain Administrative Duties: In order to provide the raw data for the statutorily required annual report, (pursuant to **Idaho Code**, Section 19-864) the contract holder must submit to the County and the Administrative District Judge an accounting of its books and records appertaining to the public defender's work on the last day of January for each contract year and more often if requested by the County and the Administrative District Judge.

**Qualifications:**

Any person submitting a proposal must be qualified and able to practice law in the State of Idaho. Further an applicant must be qualified, or capable and willing to

become qualified to sit second chair in a capital case by the time such qualifications may become necessary.

Pursuant to **Idaho Code**, Sections 19-859, 19-860, 19-861 and any other applicable laws of the State of Idaho, those entities or individuals responding to this Request for Proposal must demonstrate their qualifications and compliance with these statutes. Any chosen contract public defender shall be subject to periodic reviews by the Administrative District Judge and the Board of County Commissioners to ensure that services are being provided as contracted for and that complaints as to the service provided are corrected in due course.

**Payette County will provide funds to compensate and shall find additional counsel for the following matters:**

1. Lead counsel in capital cases.

2. Additional attorneys in matters involving three (3) or more co-defendants, when the co-defendants must be represented by separate counsel.

3. The second parent appearing in a child protection case, when the court orders that each parent shall be represented by separate counsel, and one parent is already represented by the Payette County Public Defender or his/her designee.

4. Additional expenses, such as DNA tests, or investigative services shall be paid by the County upon prior application and approval to the district judge and/or county commissioners for those defendants qualifying for the public defender.

**Your proposal should include the following:**

1. How you propose to manage the above requirements.

2. The dollar amount of the service. Your final cost must include rental space, copy service, office supplies, secretarial service, additional employees and overhead costs.

3. Any other information or proposed terms not specifically addressed may be submitted.

Due to the conflicts and the number of defendants qualifying for the public defender, it will be necessary for at least two (2) persons to contract with the County to fulfill the above

requirements or for the recipient of the contract to subcontract a portion of the contract. The final decision as to whether the contract will be awarded to two (2) persons or will be subcontracted by the party awarded the contract will be made by the Board of County Commissioners, upon recommendation from the District Judge.

It is NOT a requirement that the Payette County Public Defender be full-time, however, it is required that the contract recipient maintain an office located in Payette County which keeps regular business hours form at least 9:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. Monday through Thursday and 9:00 a.m. to 12:00 p.m. on Fridays, and further that the contract recipient be generally available during those office hours and devote sufficient time and resources to the position to fulfill all terms listed above. If a matter is calendared for the Payette County Public Defender in the Payette County Court, that matter shall have priority above any matters arising from the contract recipient's private caseload. IT SHALL BE THE DUTY OF THE PAYETTE COUNTY PUBLIC DEFENDER TO PAY THE COSTS ASSOCIATED WITH APPOINTING ADDITIONAL COUNSEL WHEN HE/SHE HAS A CALENDARING OR ETHICAL CONFLICT, EXCEPT AS PROVIDED FOR ABOVE.

The Payette County Commissioners reserve the right to reject any and all proposals. Upon award of the contract, the contract recipient(s) will have 30 days in which to negotiate any additional terms and to endorse the contract. Additional contract terms will be added. Previous contracts may be reviewed upon request. The contract will begin October 1, 2008 and expire September 30, 2010. However, in the event of emergency, the contract recipient must be prepared to assume all responsibility upon award.

**All proposals are to be sealed and delivered to Betty Dressen by September 22, 2008 at 5:00 p.m. The award will be made on or about September 25, 2008.**

Upon submission of my proposal, I agree to the above terms and conditions.

Signature: _____

Please print name: _____

**AGREEMENT BETWEEN PAYETTE COUNTY, IDAHO AND KELLY WHITING FOR THE PROVISION OF SERVICES OF PUBLIC DEFENDER**

The County of Payette, State of Idaho, a political subdivision authorized to enter into agreements and contracts by Idaho law, acting by and through its Board of County Commissioners enters into the following agreement with KELLY WHITING, Attorney at Law of Fruitland, Idaho, for the purpose of providing legal representation to indigent persons in Criminal and Quasi-criminal cases in Payette County, for the period of **October 1, 2014 to September 30, 2016.**

Hereinafter, Payette County will be referred to as the "COUNTY" and KELLY WHITING will be referred to as the "CONTRACTOR". The parties agree as follows:

1 This agreement shall be for all services and expenses of a public defender for Payette County for the calendar years stated above, excluding extraordinary expenses as may be determined by the parties to this agreement. Such extraordinary expenses shall be determined through negotiations between the parties and shall be authorized only upon written agreement of both parties or in accordance with Paragraph 11.

2. The COUNTY agrees to pay to the CONTRACTOR for the term above described, sums to be payable as follows:

A. CONTRACTOR agrees to dedicate whatever days per month are necessary to provide the full services required hereunder to working on matters he is appointed to under this Agreement. The days that CONTRACTOR performs under this Agreement will be defined as "Public Days." A Public Day is any day in which CONTRACTOR must appear in Court for a client he is appointed to under this Agreement, or any day in which CONTRACTOR works for 5 or more hours on clients he is appointed to under this Agreement. There is not a limit to the number of days that CONTRACTOR may use as Public Days in any given month, due to the requirement of CONTRACTOR to provide the legal services agreed to herein.

B. For each Public Day that CONTRACTOR works, the COUNTY will pay him $560.00.

C. The CONTRACTOR shall provide an invoice on the first day after the 14th of each month that the Courts are open in the COUNTY ("Working Day"), and another on the first Working Day after the 28th of each month. That invoice will identify the Public Days worked in the period after the last invoice.

D. The COUNTY shall pay the amounts claimed in said invoice within seven (7) days of receipt of the invoice.

3. CONTRACTOR hereby agrees that he shall practice law independently of any contractor under a separate public defender contract with Payette County (hereinafter "SEPARATE CONTRACTOR"), in order to avoid conflicts in representations of their respective clients. The County shall be responsible for paying no other amounts except as provided for under the terms of this contract.

4. In exchange for the payment by the COUNTY the CONTRACTOR agrees to be available full time and provide the criminal and quasi-criminal defense services for those persons determined by the Court to be indigent in the following cases:

A. All misdemeanor charges, including criminal appeals to the district court and probation violations. This paragraph shall not include cases where the CONTRACTOR has a conflict due to a prior appointment under this contract or the previous agreement.

B. All felony cases in which the SEPARATE CONTRACTOR has a conflict in representation, including probations violations.

C. All juvenile charges.

D. Representation of at least one indigent parent, if necessary, or the Guardian ad Litem, in Child Protective Act, including those child protection cases currently assigned to CONTRACTOR.

E. All probation violations where, in the discretion of the Court, the Public Defender should be appointed to represent the probationer rather than the attorney who represented the defendant in the prior criminal proceedings in which the probation was entered.

F. In all other cases in which the State has an interest, in which it is the determination of the trial court that it is appropriate that an attorney be appointed to represent an indigent party.

G. Appeals from the Magistrate Court to the District Court.

H. Post Conviction cases as assigned by the Court.

I. All cases which are currently assigned to CONTRACTOR pursuant to any previous agreements/

J. All services not herein listed but which are listed in specifications for bids which were submitted to Betty Dressen, County Clerk in response to her solicitation for such bids in 2008.

5. CONTRACTOR shall maintain an office in Payette County. The CONTRACTOR shall be responsible to pay CONTRACTORS own expenses, i.e., office space; telephone service; necessary supplies; Workman's Compensation Insurance, malpractice insurance and the like. CONTRACTOR shall keep the above referenced office generally open to the public from 9:00 a.m. to noon and 1:00 p.m. to 5:00 p.m. Monday thru Thursday and Fridays from 9:00 a.m. to 12:00 noon excepting holidays observed by Payette County. Further, CONTRACTOR agrees to be generally available at the above referenced office during regular business hours except as the court calendar, vacation, illness, and other absences may preclude.

6. All professional legal personnel assisting the CONTRACTOR in performing under this contract shall be employees or contract personnel with the CONTRACTOR. They shall not be employees of Payette County and no benefits shall be expended for them by the County. It is clearly understood and agreed by both parties to this contract that the relationship established by this contract is that of independent contractor. The CONTRACTOR agrees that he is an independent contractor and as such has the sole employment and personnel relationship with any professional legal staff serving him and performing the services under this contract.

7. The COUNTY shall provide representation for additional conflicts should they occur, except to the extent that said conflict exists due to CONTRACTOR'S private practice. To the extent CONTRACTOR cannot represent a Defendant in any particular matter where the public defender is appointed due to a conflict that exists due to CONTRACTOR'S private practice, the expenses for such representation shall be deducted from the monthly payments provided for herein as they are incurred.

8. The CONTRACTOR shall provide to the COUNTY, in timely fashion, all reports required by the Idaho Code, and shall further file any other reports relating to the operation of his office reasonably requested by the County in its efforts to maintain an efficient criminal justice system. It is understood by both parties to this agreement that the reports requested by the COUNTY shall not include information which would violate the individual constitutional rights of the indigent persons being represented by the CONTRACTOR.

9. Should this contract not be renewed, all cases which have been assigned to the CONTRACTOR by the end of the Contract term, i.e., September 30, 2014, and which cannot be reasonably assigned to a new attorney, shall be handled as a "Hold-Over" case by the CONTRACTOR at the rate of $85.00 per hour. On each case which is a "hold-over" upon completion of the contract the CONTRACTOR will bill and itemize services performed. Any case which is open at the end of the contractual term but which is open only for the purpose of awaiting sentence or entry of final plea will not be included as a billable, "hold-over case" and there will be no extra charge made by the CONTRACTOR. Provided, however, if the contract is not renewed but not assigned to another attorney, the contract shall automatically renew on a month to month basis.

10. The parties to the contract agree that in the event a special circumstance offense arises the two parties will negotiate to determine whether a supplemental agreement is necessary. For these purposes a "special circumstance" offense would be a homicide case wherein the state seeks the death penalty. In such case, where perhaps more than two or more separate attorneys would have to become involved, extraordinary expenses might be necessary.

11. This contract does not include any costs of transcripts, or any expenses of trial, investigation or appeal for which the Court may approve expenditures It is understood by CONTRACTOR that there are limited funds placed in other budget line items that have been created by COUNTY which may be drawn upon by CONTRACTOR for such expenses, or other expenses related to the defense of indigent clients, such as investigators, expert witnesses, or necessary travel expenses. CONTRACTOR may draw on such funds by obtaining advance approval for such expenses from the district judge or magistrate having jurisdiction over the case; provided, however, that in no event shall COUNTY be liable or responsible for any costs or expenses for any appeals for other proceedings that fall within the jurisdiction of the State Appellant Public Defender's office pursuant to Idaho Code 19-867, et. Seq., and as amended.

12. This agreement can be terminated by either party at any time during the term thereof by giving thirty (30) days notice of such intention in writing and delivered by certified mail. Provided, however, this agreement may be modified or cancelled should the state or federal legislature or courts of proper jurisdiction require a modification of Payette County's public defender services. Further, if it becomes clear to CONTRACTOR that these terms do not provide adequate resources for him to perform his full duties hereunder, he may seek to renegotiate the said terms with the COUNTY by scheduling a meeting with the Board of County Commissioners.

13. Wherefore, in the interest of providing for Payette County the most efficient possible defense services for those indigents declared to be needy of criminal defense services by the Courts, the COUNTY and the CONTRACTOR enter into the above agreement.

Dated this 25th day of ~~July~~ August, ~~2013~~ 2014. KRW

Marc Shigeta, Chairman
Payette County Commissioners
County of Payette, State of Idaho

ATTEST:

Betty J. Dressen, Clerk

Dated this 25th day of ~~July~~ August, ~~2013~~ 2014 KRW

KELLY WHITING, Attorney at Law

CONTRACTOR

# SPECIFICATIONS FOR THE PAYETTE COUNTY PUBLIC DEFENDER CONTRACT

**It shall be the duty of the Payette County Public Defender(s) to provide representation for the following matters:**

1. All city and county misdemeanors
2. All felonies
3. Representation of the parent, or both parents if there is no conflict, and the child/guardian ad litem in child protection actions
4. Persons held on mental holds
5. Juveniles
6. Post conviction relief
7. Conflicts for one (1) co-defendant in all misdemeanor and felony cases
8. All appeals which originate in magistrate or district court, subject to the jurisdiction of the State Appellate Public Defender
9. All cases and matters pending with the current Payette County Public Defender at the time the new contract period begins
10. Second chair in any capital case (The second chair shall not be compensated any additional funds)

**Other duties:**

Certain Administrative Duties: In order to provide the raw data for the statutorily required annual report, (pursuant to **Idaho Code**, Section 19-864) the contract holder must submit to the County and the Administrative District Judge an accounting of its books and records appertaining to the public defender's work on the last day of January for each contract year and more often if requested by the County and the Administrative District Judge.

**Qualifications:**

Any person submitting a proposal must be qualified and able to practice law in the State of Idaho. Further an applicant must be qualified, or capable and willing to

become qualified to sit second chair in a capital case by the time such qualifications may become necessary.

Pursuant to **Idaho Code**, Sections 19-859, 19-860, 19-861 and any other applicable laws of the State of Idaho, those entities or individuals responding to this Request for Proposal must demonstrate their qualifications and compliance with these statutes. Any chosen contract public defender shall be subject to periodic reviews by the Administrative District Judge and the Board of County Commissioners to ensure that services are being provided as contracted for and that complaints as to the service provided are corrected in due course.

**Payette County will provide funds to compensate and shall find additional counsel for the following matters:**

1. Lead counsel in capital cases.

2. Additional attorneys in matters involving three (3) or more co-defendants, when the co-defendants must be represented by separate counsel.

3. The second parent appearing in a child protection case, when the court orders that each parent shall be represented by separate counsel, and one parent is already represented by the Payette County Public Defender or his/her designee.

4. Additional expenses, such as DNA tests, or investigative services shall be paid by the County upon prior application and approval to the district judge and/or county commissioners for those defendants qualifying for the public defender.

**Your proposal should include the following:**

1. How you propose to manage the above requirements.

2. The dollar amount of the service. Your final cost must include rental space, copy service, office supplies, secretarial service, additional employees and overhead costs.

3. Any other information or proposed terms not specifically addressed may be submitted.

Due to the conflicts and the number of defendants qualifying for the public defender, it will be necessary for at least two (2) persons to contract with the County to fulfill the above

requirements or for the recipient of the contract to subcontract a portion of the contract. The final decision as to whether the contract will be awarded to two (2) persons or will be subcontracted by the party awarded the contract will be made by the Board of County Commissioners, upon recommendation from the District Judge.

It is NOT a requirement that the Payette County Public Defender be full-time, however, it is required that the contract recipient maintain an office located in Payette County which keeps regular business hours form at least 9:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. Monday through Thursday and 9:00 a.m. to 12:00 p.m. on Fridays, and further that the contract recipient be generally available during those office hours and devote sufficient time and resources to the position to fulfill all terms listed above. If a matter is calendared for the Payette County Public Defender in the Payette County Court, that matter shall have priority above any matters arising from the contract recipient's private caseload. IT SHALL BE THE DUTY OF THE PAYETTE COUNTY PUBLIC DEFENDER TO PAY THE COSTS ASSOCIATED WITH APPOINTING ADDITIONAL COUNSEL WHEN HE/SHE HAS A CALENDARING OR ETHICAL CONFLICT, EXCEPT AS PROVIDED FOR ABOVE.

The Payette County Commissioners reserve the right to reject any and all proposals. Upon award of the contract, the contract recipient(s) will have 30 days in which to negotiate any additional terms and to endorse the contract. Additional contract terms will be added. Previous contracts may be reviewed upon request. The contract will begin October 1, 2008 and expire September 30, 2010. However, in the event of emergency, the contract recipient must be prepared to assume all responsibility upon award.

**All proposals are to be sealed and delivered to Betty Dressen by September 22, 2008 at 5:00 p.m. The award will be made on or about September 25, 2008.**

Upon submission of my proposal, I agree to the above terms and conditions.

Signature: _____

Please print name: _____

Replaced 8-25-14

# AGREEMENT BETWEEN PAYETTE COUNTY, IDAHO AND KELLY WHITING FOR THE PROVISION OF SERVICES OF PUBLIC DEFENDER

The County of Payette, State of Idaho, a political subdivision authorized to enter into agreements and contracts by Idaho law, acting by and through its Board of County Commissioners enters into the following agreement with KELLY WHITING, Attorney at Law of Payette, Idaho, for the purpose of providing legal representation to indigent persons in Criminal and Quasi-criminal cases in Payette County, for the period of **October 1, 2012** through **September 30, 2014.**

Hereinafter, Payette County will be referred to as the "COUNTY" and KELLY WHITING will be referred to as the "CONTRACTOR". The parties agree as follows:

1. This agreement shall be one of two contractual provisions for all services and expenses of a public defender's office for Payette County for the calendar years stated above, excluding extraordinary expenses as may be determined by the parties to this agreement. Such extraordinary expenses shall be determined through negotiations between the parties and shall be authorized only upon written agreement of both parties.

2. The COUNTY agrees to pay to the CONTRACTOR for the term above described, said sum to be payable as follows:

> $10,000 to be paid on the Wednesday after the second Monday of each month during the term of this contract, commencing **October 1, 2012.**

3. CONTRACTOR hereby agrees that he shall practice law independently of any contractor under a separate public defender contract with Payette County (hereinafter "SEPARATE CONTRACTOR"), in order to avoid conflicts in representations of their respective clients. The County shall be responsible for paying no other amounts except as provided for under the terms of this contract.

4. In exchange for the payment by the COUNTY the CONTRACTOR agrees to be available full time and provide the criminal and quasi-criminal defense services for those persons determined by the Court to be indigent in the following cases:

A. All misdemeanor charges filed on or after October 1, 2012, including criminal appeals to the district court and probation violations. This paragraph shall not include cases where the CONTRACTOR has a conflict due to a prior appointment under this contract or the previous agreement.

B. All felony cases in which the SEPARATE CONTRACTOR has a conflict in representation, and which are arraigned in the District Court on or after October 1, 2012 including probations violations.

C. All juvenile charges filed on or after October 1, 2012.

D. Representation of at least one indigent parent, if necessary, or the Guardian ad Litem, in Child Protective Act cases filed on or after October 1, 2012, including those child protection cases currently assigned to CONTRACTOR.

E. All probation violations filed on or after October 1, 2012, where, in the discretion of the Court, the Public Defender should be appointed to represent the probationer rather than the attorney who represented the defendant in the prior criminal proceedings in which the probation was entered.

F. In all other cases in which the State has an interest, and which are filed on or after October 1, 2012, in which it is the determination of the trial court that it is appropriate that an attorney be appointed to represent an indigent party.

G. Appeals from the Magistrate Court to the District Court.

H. All cases which are currently assigned to CONTRACTOR pursuant to his previous subcontractor's agreement with Phillip B. Heersink.

I. All services listed in specifications for bids which were submitted to Betty Dressen, County Clerk in response to her solicitation for such bids in 2008, and which is attached hereto.

5. CONTRACTOR shall maintain an office in Payette County. The CONTRACTOR shall be responsible to pay CONTRACTORS own expenses, i.e., office space; telephone service; necessary

supplies; Workman's Compensation Insurance, malpractice insurance and the like. CONTRACTOR shall keep the above referenced office generally open to the public from 9:00 a.m. to noon and 1:00 p.m. to 5:00 p.m. Monday thru Thursday and Fridays from 9:00 a.m. to 12:00 noon excepting holidays observed by Payette County. Further, CONTRACTOR agrees to be generally available at the above referenced office during regular business hours except as the court calendar, vacation, illness, and other absences may preclude.

6. All professional legal personnel assisting the CONTRACTOR in performing under this contract shall be employees or contract personnel with the CONTRACTOR. They shall not be employees of Payette County and no benefits shall be expended for them by the County. It is clearly understood and agreed by both parties to this contract that the relationship established by this contract is that of independent contractor. The CONTRACTOR agrees that he is an independent contractor and as such has the sole employment and personnel relationship with any professional legal staff serving him and performing the services under this contract.

7. The COUNTY shall provide representation for additional conflicts should they occur, except to the extent that said conflict exists due to CONTRACTOR'S private practice. To the extent CONTRACTOR cannot represent a Defendant in any particular matter where the public defender is appointed due to a conflict that exists due to CONTRACTOR'S private practice, the expenses for such representation shall be deducted from the monthly payments provided for herein as they are incurred.

8. The CONTRACTOR shall provide to the COUNTY, in timely fashion, all reports required by the Idaho Code, and shall further file any other reports relating to the operation of his office reasonably requested by the County in its efforts to maintain an efficient criminal justice system.

It is understood by both parties to this agreement that the reports requested by the COUNTY shall not include information which would violate the individual constitutional rights of the indigent persons being represented by the CONTRACTOR.

9. Should this contract not be renewed, all cases which have been assigned to the CONTRACTOR by the end of the Contract term, i.e., September 30, 2014 and which cannot be reasonably assigned to a new attorney, shall be handled as a "Hold-Over" case by the CONTRACTOR at the rate of $85.00 per hour. On each case which is a "hold-over" upon completion of the contract the CONTRACTOR will bill and itemize services performed. Any case which is open at the end of the contractual term but which is open only for the purpose of awaiting sentence or entry of final plea will not be included as a billable, "hold-over case" and there will be no extra charge made by the CONTRACTOR.

10. The parties to the contract agree that in the event a special circumstance offense arises the two parties will negotiate to determine whether a supplemental agreement is necessary. For these purposes a "special circumstance" offense would be a homicide case wherein the state seeks the death penalty. In such case, where perhaps more than two or more separate attorneys would have to become involved, extraordinary expenses might be necessary. Other special circumstance, but such are unpredictable and unable to be determined at this time. In the event that such special circumstance case occurs, the parties shall discuss whether a case qualifies as a special circumstance, and shall discuss expenses for unknown projections of change of venue, psychological evaluations of defendants, living expenses for change of venue, expenses for conflicts of interest attorneys necessary beyond all of the attorneys available either in the Contractor's office or in his conflicts of interest offices and other unforeseen expenses which cannot be considered by the contracting parties at this

time. In the event the parties are unable to agree the extraordinary expenses shall be determined by a District Judge of the Third Judicial District not currently assigned to Payette County.

11. This agreement can be terminated by either party at any time during the term thereof by giving thirty (30) days notice of such intention in writing and delivered by certified mail.

12. Wherefore, in the interest of providing for Payette County the most efficient possible defense services for those indigents declared to be needy of criminal defense services by the Courts, the COUNTY and the CONTRACTOR enter into the above agreement.

Dated this 2nd day of July, 2012.

Rudy Endrikat, Chairman
Payette County Commissioners
County of Payette, State of Idaho

ATTEST:

Betty J. Dressen
Betty J. Dressen, Clerk

Dated this 2nd day of ~~June~~ July, 2012.

KELLY WHITING, Attorney at Law

CONTRACTOR

Replaced 8-25-14

**AGREEMENT BETWEEN PAYETTE COUNTY, IDAHO AND PHILLIP B. HEERSINK FOR THE PROVISION OF SERVICES OF PUBLIC DEFENDER**

The County of Payette, State of Idaho, a political subdivision authorized to enter into agreements and contracts by Idaho law, acting by and through its Board of County Commissioners enters into the following agreement with PHILLIP B. HEERSINK, Attorney at Law of Payette, Idaho, for the purpose of providing legal representation to indigent persons in Criminal and Quasi-criminal cases in Payette County, for the period of **October 1, 2012** through **September 30, 2014.**

Hereinafter, Payette County will be referred to as the "COUNTY" and PHILLIP B. HEERSINK will be referred to as the "CONTRACTOR". The parties agree as follows:

1. This agreement shall be one of two contractual provisions for all services and expenses of a public defender's office for Payette County for the calendar years stated above, excluding extraordinary expenses as may be determined by the parties to this agreement. Such extraordinary expenses shall be determined through negotiations between the parties and shall be authorized only upon written agreement of both parties.

2. The COUNTY agrees to pay to the CONTRACTOR for the term above described, said sum to be payable as follows:

> $8,000 to be paid on the Wednesday after the second Monday of each month during the term of this contract, commencing **October 1, 2012.**

3. CONTRACTOR hereby agrees that he shall practice law independently of any contractor under a separate public defender contract with Payette County (hereinafter "SEPARATE CONTRACTOR"), in order to avoid conflicts in representations of their respective clients. The

County shall be responsible for paying no other amounts except as provided for under the terms of this contract.

4. In exchange for the payment by the COUNTY the CONTRACTOR agrees to be available full time and provide the criminal and quasi-criminal defense services for those persons determined by the Court to be indigent in the following cases:

A. All felony charges filed on or after October 1, 2012, including probation violations. This paragraph shall not include cases where the CONTRACTOR has a conflict due to a prior appointment under this contract or the previous agreement entered into in 2012.

B. All misdemeanor cases in which the SEPARATE CONTRACTOR has a conflict in representation, including criminal appeals to the district court and probation violations, and including probations violations.

C. All mental commitment petitions/hearings filed on or after October 1, 2012.

D. Representation of at least one indigent parent, if necessary, or the Guardian ad Litem, in Child Protective Act cases filed on or after October 1, 2012,; including those child protection cases currently assigned to CONTRACTOR.

E. All probation violations filed on or after October 1, 2012, where, in the discretion of the Court, the Public Defender should be appointed to represent the probationer rather than the attorney who represented the defendant in the prior criminal proceedings in which the probation was entered.

F. In all other cases in which the State has an interest, and which are filed on or after October 1, 2012, in which it is the determination of the trial court that it is appropriate that an attorney be appointed to represent an indigent party.

G. Appeals from the Magistrate Court to the District Court.

H. All cases which are currently assigned to CONTRACTOR pursuant to his previous public defender agreement with the County.

I. All services listed in specifications for bids which were submitted to Betty Dressen, County Clerk in response to her solicitation for such bids in 2008, and which is attached hereto.

5. CONTRACTOR shall maintain an office in Payette County. The CONTRACTOR shall be responsible to pay CONTRACTORS own expenses, i.e., office space; telephone service; necessary supplies; Workman's Compensation Insurance, malpractice insurance and the like. CONTRACTOR shall keep the above referenced office generally open to the public from 9:00 a.m. to noon and 1:00 p.m. to 5:00 p.m. Monday thru Thursday and Fridays from 9:00 a.m. to 12:00 noon excepting holidays observed by Payette County. Further, CONTRACTOR agrees to be generally available at the above referenced office during regular business hours except as the court calendar, vacation, illness, and other absences may preclude.

6. All professional legal personnel assisting the CONTRACTOR in performing under this contract shall be employees or contract personnel with the CONTRACTOR. They shall not be employees of Payette County and no benefits shall be expended for them by the County. It is clearly understood and agreed by both parties to this contract that the relationship established by this contract is that of independent contractor. The CONTRACTOR agrees that he is an independent contractor and as such has the sole employment and personnel relationship with any professional legal staff serving him and performing the services under this contract.

7. The COUNTY shall provide representation for additional conflicts should they occur, except to the extent that said conflict exists due to CONTRACTOR'S private practice. To the extent CONTRACTOR cannot represent a Defendant in any particular matter where the public defender is appointed due to a conflict that exists due to CONTRACTOR'S private practice, the expenses for such representation shall be deducted from the monthly payments provided for herein as they are incurred.

It is understood by both parties to this agreement that the reports requested by the COUNTY shall not include information which would violate the individual constitutional rights of the indigent persons being represented by the CONTRACTOR.

9. Should this contract not be renewed, all cases which have been assigned to the CONTRACTOR by the end of the Contract term, i.e., September 30, 2014 and which cannot be reasonably assigned to a new attorney, shall be handled as a "Hold-Over" case by the CONTRACTOR at the rate of $85.00 per hour. On each case which is a "hold-over" upon completion of the contract the CONTRACTOR will bill and itemize services performed. Any case which is open at the end of the contractual term but which is open only for the purpose of awaiting sentence or entry of final plea will not be included as a billable, "hold-over case" and there will be no extra charge made by the CONTRACTOR.

10. The parties to the contract agree that in the event a special circumstance offense arises the two parties will negotiate to determine whether a supplemental agreement is necessary. For these purposes a "special circumstance" offense would be a homicide case wherein the state seeks the death penalty. In such case, where perhaps more than two or more separate attorneys would have to become involved, extraordinary expenses might be necessary. Other special circumstance, but such are unpredictable and unable to be determined at this time. In the event that such special circumstance case occurs, the parties shall discuss whether a case qualifies as a special circumstance, and shall discuss expenses for unknown projections of change of venue, psychological evaluations of defendants, living expenses for change of venue, expenses for conflicts of interest attorneys necessary beyond all of the attorneys available either in the Contractor's office or in his conflicts of interest offices and other unforeseen expenses which cannot be considered by the contracting parties at this

and shall discuss expenses for unknown projections of change of venue, psychological evaluations of defendants, living expenses for change of venue, expenses for conflicts of interest attorneys necessary beyond all of the attorneys available either in the Contractor's office or in his conflicts of interest offices and other unforeseen expenses which cannot be considered by the contracting parties at this time. In the event the parties are unable to agree the extraordinary expenses shall be determined by a District Judge of the Third Judicial District not currently assigned to Payette County.

11. This agreement can be terminated by either party at any time during the term thereof by giving thirty (30) days notice of such intention in writing and delivered by certified mail.

12. Wherefore, in the interest of providing for Payette County the most efficient possible defense services for those indigents declared to be needy of criminal defense services by the Courts, the COUNTY and the CONTRACTOR enter into the above agreement.

Dated this 2nd day of July, 2012.

Rudy Endrikat, Chairman
Payette County Commissioners
County of Payette, State of Idaho

ATTEST:

Betty J. Dressen, Clerk

Dated this 2nd day of ~~June~~ July, 2012.

PHILLIP B. HEERSINK, Attorney at Law

CONTRACTOR

**CONTRACT FOR LEGAL REPRESENTATION OF INDIGENTS**

THIS CONTRACT is made and entered into between the County of Gem, a political subdivision of the State of Idaho, by and through its representative, the Board of County Commissioners, hereinafter called "County", and Mimura Law Offices, PLLC, hereinafter called "Public Defender."

WHEREAS, the aforementioned County has the legal obligation to provide for legal representation of indigent persons within its boundaries, and

WHEREAS, it is mutually agreed by the parties to this Contract for Legal Representation of Indigents that the term of this Contract shall be from October 1, 2007, to September 30, 2008, subject to renewal, by written agreement, for an additional one-year term at an agreed upon amount to be determined no later than July 1st 2008; and

WHEREAS, the continued contracting for public defender services is in the best interest of the County in promoting the efficient administration of justice, continuity for the indigent clientele needing legal services, and conforms to the highest standard of due process of law guaranteed by our State and Federal constitutions; and

WHEREAS, the County Commissioners of the aforementioned County have mutually agreed to contract with Public Defender, to provide such representation in the County.

NOW, WITNESSETH:

The County has employed, and does hereby contract with Public Defender to hereafter, for the term of this contract, act as counsel to any needy or indigent person who has a legal right to court appointment of counsel to represent him or her and who shall come within the jurisdiction of the courts of this County, as herein provided. Specifically included, but not limited to, any needy or indigent person who is being detained by a law enforcement officer, or any person who is under formal charge of having committed or is being detained under a conviction of a serious crime as defined in Idaho Code Section 19-851; proposed patients in commitment proceedings, parents or children under the jurisdiction of the Child Protective Act, the Termination of Parent and Child Relationship Act or the Juvenile Corrections Act; and all other persons for whom the County has a legal obligation to provide legal representation, with the exception of any claim of ineffective assistance of counsel or any proceeding under the Post Conviction Relief Act. The Public Defender shall provide for such needy persons all legal services to which they are, or may become, entitled under the Constitution of the United States or the laws of the State of Idaho.

It is understood that Gem County will participate in the Idaho Capital Crimes Defense Program and the State Public Defender Appellate Program.



**EXHIBIT C**

It is understood and agreed by the parties that the court concerned with the foregoing matters shall determine whether a person desiring services of the Public Defender is a "needy or indigent person" within the meaning of the statute authorizing the appointment.

It is further understood and agreed that Public Defender shall at all times during this agreement be, and remain, a Professional Limited Liability Company whose current managing members are licensed to practice law in this state, and that any attorney(s) providing services under this Contract will be competent to counsel and represent an indigent person in legal proceedings.

Gem County shall pay the sum of One Hundred, Eighty-One Thousand, Five Hundred dollars and no cents. ($ 181,500.00) for Public Defender services from October 1, 2007, to September 30, 2008, to Public Defender. This amount shall be paid in twelve (12) equal monthly installments of Fifteen Thousand, One Hundred and Twenty-Five dollars and no cents ($ 15,125.00) due and payable on or before the last business day of each month.

It is further understood that the Public Defender shall maintain a lawyer's professional liability insurance policy for themselves and their staff covering representation of clients assigned by the court for representation by the Office of the Public Defender. The Public Defender further agrees to hold the County harmless for any claims of malfeasance or misfeasance brought against the County by any person for whom representation is provided by the Public Defender under direction of the court.

It is further understood and agreed that Public Defender shall submit a report to the Board of County Commissioners of the County on or about June 1, 2008, for informational purposes to plan for the following fiscal year's budget.

It is further understood and agreed that Public Defender shall file an affidavit of attorneys fees, or orally advise the Court of any fees earned in appointed cases in which it provides legal services and will seek an order of reimbursement on behalf of the County where appropriate.

In the event that an ethical conflict exists as a result of the Public Defender's representation of any client, the Public Defender shall notify the court, the court shall appoint alternate counsel. The Public Defender shall pay the first said alternate counsel compensation for attorney's fees and costs incurred by alternate counsel at the rate of $70.00 per hour as per Administrative Order; or the amount provided by any change in Administrative Order during the term(s) of this Agreement. The Public Defender shall also be responsible for payment of any additional conflict counsel appointed by the Court in any proceedings brought under the Child Protective Act. With that exception, the County shall be responsible for contracting with and paying any conflict counsel beyond the first conflict counsel appointed by the Court in any particular case during the term of this contract. The Public Defender agrees that any conflict Public Defender shall be licensed to practice law in the State of Idaho and competent to defend and represent indigent persons in legal proceedings and will obtain from each so qualified conflict counsel a written agreement to hold the County harmless from any claims of malfeasance or misfeasance brought against the County by any person for whom representation is provided by any

conflict Public Defender appointed by the Court.

It is agreed that Public Defender will maintain an office and staff in Emmett, Idaho. The parties understand and agree that an actual business office shall be established and shall be open for business between the hours of approximately 9:00 am through 12:00 pm and 1:00 pm through 4:00 pm Monday through Thursday, and shall be available by telephone between approximately 9:00 am through 5:00 pm on Fridays. The Public Defender may be closed for federally recognized and County holidays.

It is further understood by the parties of this Contract that in the event a special-circumstance offense arises, the two parties will negotiate to determine a supplemental agreement. For these purposes, a "special-circumstance" offense is where the offense of murder is charged, whether with one or with multiple defendants. Where a defendant is accused of murder, one or more attorneys may need to be involved and extraordinary expenses, which are unpredictable and cannot be determined at this time, may become necessary. These extraordinary expenses may include, but are not limited to, attorney's fees, psychological evaluation and expert testimony, ballistics and forensic scientific testing and expert testimony, change of venue expenses, and conflict-of-interest attorneys. In the event the parties are unable to agree, the extraordinary expenses shall be determined by a committee consisting of the Chairman of the Board of Gem County Commissioners, the sitting lawyer-magistrate for Gem County, and a representative of the Gem County Prosecuting Attorney's Office. Special-circumstance expenses shall be utilized only by the approval and order of the district court and these expenses shall be paid by the County.

This agreement may be terminated by either party at any time during the term thereof by giving thirty (30) days' notice of such intention in writing and delivered by certified mail.

This agreement is binding on the heirs, executors, administrators, successors and assigns of the parties hereto, but nothing herein shall be construed to permit a substitution of parties without consent of all parties hereto.

IN WITNESS WHEREOF, the parties hereto have set their hands on the day and year set forth below.

**GEM COUNTY BOARD OF COMMISSIONERS**

Michele Sherrer 11-7-2007

Michele Sherrer, Chairman Date

ATTEST:

Shelly Gannon

Shelly Gannon, Gem County Clerk

**GEM COUNTY PUBLIC DEFENDER**

11/1/2007

Mimura Law Offices, PLLC — Date
Susan Lynn Mimura, Chairman

# CONTRACT FOR LEGAL REPRESENTATION OF INDIGENTS

THIS CONTRACT is made and entered into between the County of Gem, a political subdivision of the State of Idaho, by and through its representative, the Board of County Commissioners, hereinafter called "County", and Mimura Law Offices, PLLC, hereinafter called "Public Defender."

WHEREAS, the aforementioned County has the legal obligation to provide for legal representation of indigent persons within its boundaries, and

WHEREAS, it is mutually agreed by the parties to this Contract for Legal Representation of Indigents that the term of this Contract shall be from October 1, 2010, to September 30, 2011, subject to renewal, by written agreement, for an additional one-year term at an agreed upon amount to be determined no later than July 1, 2011; and

WHEREAS, contracting for public defender services is in the best interest of the County in promoting the efficient administration of justice, and conforms to the highest standard of due process of law guaranteed by our State and Federal constitutions; and

WHEREAS, the County Commissioners of the aforementioned County have mutually agreed to contract with Public Defender, to provide such representation in the County.

NOW, WITNESSETH:

The County has employed, and does hereby contract with Public Defender to hereafter, for the term of this contract, act as counsel to any needy or indigent person who has a legal right to court appointment of counsel to represent him or her and who shall come within the jurisdiction of the courts of this County, as herein provided. Specifically included, but not limited to, any needy or indigent person who is being detained by a law enforcement officer, or any person who is under formal charge of having committed or is being detained under a conviction of a serious crime as defined in Idaho Code Section 19-851; proposed patients in commitment proceedings, parents or children under the jurisdiction of the Child Protective Act, the Termination of Parent and Child Relationship Act or the Juvenile Corrections Act; and all other persons for whom the County has a legal obligation to provide legal representation, with the exception of any claim of ineffective assistance of counsel or any proceeding under the Post Conviction Relief Act. The Public Defender shall provide for such needy persons all legal services to which they are, or may become, entitled under the Constitution of the United States or the laws of the State of Idaho.

It is understood that Gem County will participate in the Idaho Capital Crimes Defense Program and the State Public Defender Appellate Program.

It is understood and agreed by the parties that the court concerned with the foregoing matters shall determine whether a person desiring services of the Public Defender is a "needy or indigent person" within the meaning of the statute authorizing the appointment.

It is further understood and agreed that Public Defender shall at all times during this agreement be, and remain, a Professional Limited Liability Company whose current managing members are licensed to practice law in this state, and that any attorney(s) providing services under this Contract will be competent to counsel and represent an indigent person in legal proceedings.

Gem County shall pay the sum of One Hundred Eighty Thousand Dollars ($180,000) for Public Defender services from October 1, 2010, to September 30, 2011, to Public Defender. This amount shall be paid in twelve (12) equal monthly installments of Fifteen Thousand Dollars ($15,000) due and payable on the last business day of each month.

It is further understood that the Public Defender shall maintain a lawyer's professional liability insurance policy for themselves and their staff covering representation of clients assigned by the court for representation by the Office of the Public Defender. The Public Defender further agrees to hold the County harmless for any claims of malfeasance or misfeasance brought against the County by any person for whom representation is provided by the Public Defender under direction of the court.

It is further understood and agreed that Public Defender shall submit a report to the Board of County Commissioners of the County on or about June 1, 2011, for informational purposes to plan for the following fiscal year's budget.

It is further understood and agreed that Public Defender shall file an affidavit of attorneys fees earned in every case in which they provide legal services and seek an order of reimbursement on behalf of the County in each case.

In the event that an ethical conflict exists as a result of the Public Defender's representation of any client, the Public Defender shall notify the court, the court shall appoint alternate counsel. The Public Defender shall pay the first said alternate counsel compensation for attorney's fees and costs incurred by alternate counsel at the rate of $75.00 per hour as per administrative order. The Public Defender shall also be responsible for payment of any additional conflict counsel appointed by the Court in any proceedings brought under the Child Protective Act. With that exception, the County shall be responsible for contracting with and paying any conflict counsel beyond the first conflict counsel appointed by the Court in any particular case during the term of this contract. The Public Defender agrees that any conflict Public Defender shall be licensed to practice law in the State of Idaho and competent to defend and represent indigent persons in legal proceedings and will obtain from each so qualified conflict counsel a written agreement to hold the County harmless from any claims of malfeasance or misfeasance brought against the County by any person for whom representation is provided by any conflict Public Defender appointed by the Court.

It is agreed that Public Defender will maintain an office and staff in Emmett, Idaho. The parties understand and agree that an actual business office shall be established and shall be open for business between the hours of approximately 9:00 am through 12:00 pm and 1:00 pm through 5:00 pm Monday through Thursday, and between approximately 9:00 am through 12:00

pm on Friday, except for County holidays.

It is further understood by the parties of this Contract that in the event a special-circumstance offense arises, the two parties will negotiate to determine a supplemental agreement. For these purposes, a "special-circumstance" offense is where the offense of murder is charged, whether with one or with multiple defendants. Where a defendant is accused of murder, one or more attorneys may need to be involved and extraordinary expenses, which are unpredictable and cannot be determined at this time, may become necessary. These extraordinary expenses may include, but are not limited to, attorney's fees, psychological evaluation and expert testimony, ballistics and forensic scientific testing and expert testimony, change of venue expenses, and conflict-of-interest attorneys. In the event the parties are unable to agree, the extraordinary expenses shall be determined by a committee consisting of the Chairman of the Board of Gem County Commissioners, the sitting lawyer-magistrate for Gem County, and a representative of the Gem County Prosecuting Attorney's Office. Special-circumstance expenses shall be utilized only by the approval and order of the district court and these expenses shall be paid by the County.

This agreement may be terminated by either party at any time during the term thereof by giving thirty (30) days' notice of such intention in writing and delivered by certified mail.

This agreement is binding on the heirs, executors, administrators, successors and assigns of the parties hereto, but nothing herein shall be construed to permit a substitution of parties without consent of all parties hereto.

IN WITNESS WHEREOF, the parties hereto have set their hands on the day and year set forth below.

GEM COUNTY BOARD OF COMMISSIONERS

_____

Lan Smith, Chairman Date

ATTEST:

_____

Shelly Gannon, Gem County Clerk

GEM COUNTY PUBLIC DEFENDER

_____

Mimura Law Offices, PLLC Date

# CUSTER COUNTY
# PUBLIC DEFENDER CONTRACT

This agreement is entered into this 1st day of July, 2012, by and between Custer County, State of Idaho, a political subdivision of the State of Idaho, hereinafter "COUNTY", and David Cannon, attorney at law, who is licensed to practice law in the State of Idaho, hereinafter "ATTORNEY".

## WITNESSETH

WHEREAS, the County of Custer, State of Idaho, desires to contract with the above attorney at law for legal services to be provided to Custer County and for the legal representation of indigent persons who are charged with criminal offenses and who are eligible for the services of a court appointed attorney, and for the legal services as set forth hereafter, and

WHEREAS, the Attorney desires to accept the responsibilities and benefits described in this agreement;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained in this document, the parties to this agreement hereby stipulate and contract as follows:



## DUTIES

The Attorney agrees to perform as a Public Defender and shall perform all the duties required by law of a Public Defender, as listed in Idaho Code § 19-852, including the following:

1. Represent all indigent persons who are under formal charge, of having committed or being detained under a conviction of a serious crime, when appointed by a court of law.

2. Represent all indigent persons in Juvenile Corrections Act (Idaho Code § 20-501 et. seq.) proceedings and any other juvenile proceedings when appointed by a court of law.

3. Represent all indigent persons sentenced from Custer County, when those persons file Uniform Post Conviction proceedings when appointed by a court of law.

4. Represent all indigent persons who are involved in involuntary civil commitment proceedings, when appointed by a court of law.

5. Represent all indigent persons who are involved in Appeals, at all levels, to higher courts, except the Idaho State Court of Appeals, the Idaho Supreme Court, and Federal Courts, when appointed by a court of law.

6. Represent all indigent persons who are charged with probation violations, when

appointed by a court of law.

7. Represent children, indigent parents, guardians, or others in Child Protection Act (Idaho Code § 16-1602 et seq.) proceedings, when appointed by a court of law.

8. The Attorney shall not be required to represent any persons who are involved in guardianship or conservatorship unless appointed by a court of law and unless said Attorney is provided additional compensation for the performance of those functions; said compensation shall be paid from the contingent District Court Fund provided this purpose and other purposes set forth in this document.

9. The Attorney shall be paid extra compensation at the rate of $65.00 per hour and reasonable expenses for defenses of the following:

a) Capital Offenses;
b) Potential Capital Offenses
c) Attempted Capital Offenses

II

**LIMITATIONS**

It is agreed the Attorney may engage in the private criminal and civil practice of law as provided in the Canons of Ethics of the Idaho State Bar and the American Bar Association as long as said private practice does not violate said canons of ethics.

III

**ASSUMPTION OF RESPONSIBILITIES**

The Attorney shall assume all of the responsibilities required of a Public Defender , when appointed by a Court, beginning July 1, 2012. It is specifically agreed that the Attorney shall assume the responsibility to represent all indigent persons who are eligible for a court appointed attorney on or subsequent to July 1, 2012, and he shall also be responsible for the representation of indigent persons who have cases pending and who have been represented by a court appointed attorney prior to July 1, 2012. A few select indigents who already have appointed counsel other than the Attorney and whose best interest would be served by the continuation of the present appointed counsel shall continue as such outside the terms of this agreement.

IV

**TERM OF CONTRACT**

It is specifically agreed that the term of this contract and the agreements and provisions which are the subject to this contract, shall be in effect from July 1, 2012 through July 1, 2017.

V

## COMPENSATION

It is specifically agreed that Custer County shall pay to the Attorney who has executed this agreement, during the term of this contract, the sum of FOUR THOUSAND ONE HUNDRED SIXTY-SEVEN DOLLARS ($4,167.00) per month, FIFTY THOUSAND DOLLARS ($50,000) per year, with the first payment to be made on the last day of the month of July, 2012, and equal monthly installments to be made on the last day of each month thereafter. It being further understood that the contract will be reviewed at regular intervals to determine the need for upward adjustment and contract modification based on economic factors at the time. However, under no circumstances will the County pay less than the amount set forth herein. The first review shall take place during the regular County Commissioners meeting in July, 2013 and regular reviews to be held at one year intervals thereafter. It being understood by the parties hereto that if the Attorney shall exceed, fifty (50) hours per month, such additional time spent shall be compensated at the rate of SIXTY-FIVE DOLLARS ($65.00) per hour. It being further understood that the Attorney shall not charge Custer County for the travel expenses. However, should the County be unable to increase the payment to compensate for said additional time being expended on behalf of this contract, the contract may be terminated by the parties hereto without further penalty or liability. At the time of termination, those cases which are currently being served by the Attorney to this agreement shall continue at the current Seventh District Court appointed attorney fee rate. Each installment payment shall be paid to the Attorney on or before the last day of each month, provided that the Attorney shall file with Custer County on a monthly basis a claim form indicating the services provided pursuant to this contract.

VI

## COMPENSATION INCLUSIONS

The compensation provided for in the preceding paragraph is the total compensation which shall be paid to the Attorney and includes all compensation that may be paid to any assistant or other attorneys who may be employed as independent contractors or otherwise by the attorney. The compensation is also the total compensation which shall be provided for clerks, stenographers, secretaries, paralegals and other persons that the Attorney may hire, and the compensation shall also include the total compensation for appropriate office facilities, furniture, equipment, books, postage, paper supplies, other facilities and supplies and travel expenses, which are required to perform the terms and provisions of this contract, except that it is specifically agreed that the total compensation listed in the preceding paragraphs with that title shall not include compensation which may be provided to the Attorney for extraordinary services which may be provided and which may be compensated from a contingent District Court fund specifically established for the purpose of providing compensation to Public Defenders for extraordinary services that are provided to indigent persons pursuant to court appointment.

VII

## EXTRAORDINARY COMPENSATION

It is specifically agreed that a District Court fund shall be established for the purpose of providing compensation to the Attorney for the performance of the extraordinary duties required of a Public Defender and when he is required to pursue any appeal to the District Court which requires the filing of necessary appeal pleadings, the preparation and printing and filing of an appeal brief or briefs. It is also agreed that additional compensation shall be provided when the Attorney appointed by the Court to represent indigent persons in guardianship, conservatorship and child protection proceedings. It is also specifically agreed that additional compensation shall be paid for actual out-of-pocket expenses, which are incurred by the Attorney, in handling the items set forth in this paragraph, said expenses shall include but not be limited to the following:

1. Expenses for printing, binding and mailing of briefs.

2. Investigations, experts and/or psychiatric and medical examinations.

It is further agreed that the additional compensation provided for the performance of the extraordinary services set forth above shall be claimed and paid, based subject to a determination of reasonableness by the Custer County Commissioners. It is further agreed that the out-of-pocket expenses which are incurred for the performance of extraordinary services as set forth above, shall be claimed and paid when properly verified and considered reasonable by the Custer County Commissioners.

VIII

## CONFLICTS

It is specifically agreed that the Attorney is not required to employ other attorneys, who are competent and qualified to practice law within the State of Idaho, for the performance of the services required of a Public Defender when the party to this agreement has a conflict of interest and is unable to represent a particular indigent defendant. It is further agreed that in the event there is such a conflict which cannot be handled by the attorney, additional compensation shall be allowed to other attorneys who are required to be employed and appointed by the Court for the representation of indigent persons. The compensation required for the payment of attorneys who handle these additional conflicts shall be paid from the contingent District Court fund. Any and all fees to be paid for compensation to attorneys who handle these conflicts will be set and paid by the Court. The parties to this agreement hereby authorize any District Court Judge or Presiding Magistrate of the Seventh Judicial District of the State of Idaho to approve the appointment of reasonable counsel in conflict situations that cannot be handled by the Attorney and the parties to this agreement further authorize the Custer County Commissioners to rule upon compensation paid to those attorneys who handle such additional conflicts. The parties to this agreement further agree that a motion for the appointment of legal counsel because of a conflict may be made by the Attorney at any time. It is further agreed that the motion must be granted,

prior to the incurring of any expenses by separate appointed counsel in all cases.

IX

## RECORDS

In addition to the requirements set forth in the Idaho Code and the terms and provisions of this contract, the Attorney agrees that he shall prepare and make available to the office of the County Commissioners of Custer County, on a periodic basis subject to a timely and reasonable request, a statement of all financial expenditures that have been made by the Attorney, certifying the dollar amounts spent during the previous record keeping period in fulfilling the terms of this contract. These records shall be available to the Custer County Commissioners, following a timely and reasonable request, for an inspection of said records. The Custer County Commissioners specifically agree that all records kept by the Attorney shall be kept confidential, for all purposes, except for calculations necessary for future Public Defender contracts.

X

## COOPERATION

The Attorney agrees to cooperate with the Courts and with Custer County and Custer County agencies in the procuring of financial information from the indigent persons for whom the Attorney shall provide court appointed legal services. This cooperation is understood to mean that the Attorney may question and examine each indigent person whom he is appointed to represent for the purpose of obtaining financial information which shall disclose the assets and liabilities of the indigent client. It is specifically agreed that the Court system shall require at least one financial statement, under oath, for an indigent client, prior to the time the Court makes a determination that the indigent person is eligible for the services of Court appointed legal counsel, or within a short period of time following the appointment by the Court. The Attorney further agrees to supply to Custer County and Custer County Court system, upon reasonable request, an estimate of the time spent and the effort expended in the representation of any indigent client so that the Court may order the indigent to reimburse County for the expense of the Public Defender representation.

XI

## NOTIFICATION

The Attorney agrees that he will do everything within reason to notify the trial court and the Custer County Prosecuting Attorney at the Court Clerks of proposed changes in Court schedules or jury trial schedules or other Court appearances, as necessitated for any reason, at least twenty-four (24) hours prior to the scheduled trial or other Court appearance.

XII

This contract for the performance of the duties required of the Public Defender, and for the compensation and benefits that are agreed to in consideration of the performance of those duties, is entered into this 16 day of July, 2012, by the parties whose signatures appear below.

David Cannon

Custer County Chairman
Board of County Commissioners

Commissioner

Commissioner

ATTESTED:

Clerk of the Court

CUSTER COUNTY CONFLICT PUBLIC DEFENDER CONTRACT

WHEREAS, Custer County is required by statute or court order to furnish legal representation to certain needy, indigent, minor, and incapacitated persons at county expense,

WHEREAS, Custer County finds that from time to time the attorneys who are employed to provide such representation may have a conflict or may not have the qualifications to handle a crime which is a capital offense,

WHEREAS, it behooves Custer County to contract with an attorney to handle such cases and to contract with said attorney for a certain prescribed hourly amount prior to representation,

WHEREAS, Mr. Fred Snook is an experienced attorney licensed to practice law in the State of Idaho and is competent to counsel, advise, and represent persons to whom other representation may not be available,

THEREFORE, Custer County and Fred Snook, Esq. hereby agree to the following:

1. Representation. Fred Snook agrees to represent the individuals, to the best of his ability, to whom Custer County owes a duty to provide legal representation and to whom Custer County is unable to provide services for under the current public defender contract.

2. Term. The term of this agreement shall be from the 1st day of October, 2014 through the 29th day of September, 2015.

3. Compensation. Custer County agrees to pay Fred Snook at the hourly rate of $80 and mileage of .50¢ per mile to and from scheduled Court hearings.

4. Additional Costs and Representation. The compensation set forth in Paragraph 3 does not include payment or reimbursement to Fred Snook for additional costs of expenses of transcripts, expert witness fees, investigator fees, fees for preparation of reports ad evaluations, or other costs and expenses incurred in investigation, preparation, trial, or appeal. If such additional expenses need to be incurred and Custer County is required by statute to provide the items, then Fred Snook shall obtain advance approval for the expenditure by both the presiding judge and the Custer County Commissioners by making a written Motion for advance approval of the expenses by the presiding judge and, to the extent required by law, shall give advance written notice of the hearing to the prosecuting attorney and the Custer County Commissioners.

5. Description of Services. Fred Snook shall use his best efforts to represent any person to whom the county is required by law or statute to provide legal representation, whom it is ordered to represent by the courts in Custer County, and whom may not be represented by current contract public defenders due to a conflict. Fred Snook. Fred Snook shall not charge the person whom he represents any fee in addition to the fees paid to Fred Snook by the county under this agreement.

6. Performance of Contract. Fred Snook is solely responsible to ensure that the services which are the subject of this contract are performed in a professional, competent manner, consisted with the rules promulgated by the Idaho Supreme Court and the Idaho Bar Commission. Custer County may terminate this contract if Fred Snook establishes a pattern

of rendering ineffective assistance of counsel to needy persons under this contract or fails to abide by other rules of Professional Conduct.

7. Substitution. Fred Snook shall not delegate his responsibilities under this contract o attorney other than those named in this contract. Nor shall he delegate his responsibilities under this contract to legal interns under Rule 221 of the Idaho Bar Commission Rules, without the prior written approval of the County Commissioner as adopted by resolution.

8. Assignability. This contract is non-assignable, unless upon the prior written approval of the Count Commissioners as adopted by resolution.

9. Private Practice. Nothing in this contract shall be construed to prohibit Fred Snook from practicing law privately in addition to rendering the services called for under this contract. may contract to provide similar serviced to other counties and individuals.

10. Meeting with Clients. Fred Snook shall make reasonable efforts to meet (in person or by phone) each client in advance of the date and time set for each hearing to discuss the details of the case and/or purpose of the hearing with the client. This requirement shall not apply when the defendant and the attorney have previously met and agreed up on a course of action to be taken and no additional information is available so that no purpose would be served meeting prior to the scheduled hearing. The primary purpose of this provision is to avoid delays in starting a court hearing, avoid anxiety in clients caused by not having any information about what is expected to occur at upcoming hearing, and to avoid the payment by the county of unnecessary expense of witness travel when matters can be easily resolved but are not due to the lack of communication between lawyer and client.

11. Evaluation. The county will conduct evaluations of Fred Snook to determine whether the provisions of this contract are being met. This may be in the form of written questionnaires or interviews to clients and other relevant persons. Lawyers shall be informed of the results of any evaluation and given notice and an opportunity to respond and/or rebut any information obtained through he evaluation process.

12. Termination of Contract. This contract may be terminated by the parties upon mutual agreement or by either party upon the material breach of the terms of the contract by the other party. The county or Fred Snook may cancel this contract a any time without cause upon ninety (90) calendar days written notice specifying the date of termination. The contract shall terminate on September 29, 2015.

13. Employment Status. Fred Snook shall have and maintain the status of independent contractor.

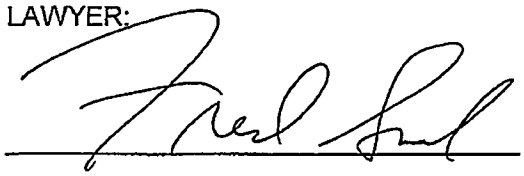
CUSTER COUNTY BOARD OF COMMISSIONERS:

Chairman _____ Date _____

Commissioner _____ Date _____

Commissioner _____ Date _____

LAWYER:



10-10-2014
Date

This contract is scheduled for signature October 29, 2014.

CUSTER COUNTY COMMISSIONERS
PO BOX 385
CHALLIS, ID 83226
(208) 879-2360
(208) 879-5246 (fax)

October 22, 2014

To Whom It May Concern:

To follow is the report submitted by the contract public defender in July, 2014. At that time he was informed that he needed to submit more information in the future as per Idaho Code 19-864(2). Our County Attorney will reiterate this instruction in correspondence to the public defender.

Barbara C. Tierney, Clerk
Custer County Commissioners

# STATEMENT OF FINANCIAL EXPENDITURES

JULY 1, 2013 THROUGH JUNE 30, 2014
CUSTER COUNTY PUBLIC DEFENDER CONTRACT

| ITEM | AMOUNT |
|---|---|
| INSURANCE | $435.00 |
| LEGAL LIBRARY | 69.13 |
| MAINTENANCE & REPAIRS | 70.50 |
| COMPUTER REPAIRS | 540.89 |
| OFFICE SUPPLIES & EQUIPMENT | 235.15 |
| PROFESSIONAL FEES | 178.75 |
| RENT | 10,500.00 |
| SECRETARY SALARY | 10,000.00 |
| TELEPHONE | 794.89 |
| UTILITIES | 479.17 |
| GASOLINE | 1960.00 |
| TOTAL | $25,263.48 |

# FRANKLIN COUNTY

Clerk of the District Court – Auditor – Recorder

October 21, 2014

Jason D Williamson
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Mr Williamson,

Enclosed is the information you requested. The contract with our Public Defender is attached. The contract is good through September, 2017.

We do not have any drafts of contracts, position announcements or other requests seeking services for the provision of indigent defense services to criminal defendants entitled to representation at public expense.

We do not have any reports at this time.

If there is anything else that you need, please feel free to contact me.

Shauna T Geddes
Franklin Co Clerk

Shauna T. Geddes, Clerk, 39 West Oneida, Preston, Idaho 83263
208-852-1090 (office) • 208-852-1094 (fax) • email: stgeddes@plmw.com

EXHIBIT E

**AGREEMENT FOR INDIGENT LEGAL SERVICES**
**IN THE SIXTH JUDICIAL DISTRICT OF IDAHO**
**FRANKLIN COUNTY**

**THIS AGREEMENT** this agreement is made between Don Marler, Marler Law Office, hereinafter referred to as the "Office of the Public Defender": and Franklin County, hereinafter referred to as "Franklin".

**IT IS AGREED AS FOLLOWS:**

1. **Office of The Public Defender.**

The Office of the Public Defender shall consist of such attorneys and employees of the Marler Law Office, as may be designated by the Public Defender. The Office Of The Public Defender shall be responsible to provide conflict counsel, except where the interest of a Franklin County Defendant is in conflict with another Franklin County Defendant. Conflict counsel shall be provided for by Franklin County, by way of separate contract of agreement.

2. **Services Covered.**

The Office Of The Public Defender shall provide legal services for indigent person in the following categories or cases:

(a) Felony Cases.

(b) Juvenile court proceedings including:

(1) Proceedings under the Juvenile Justice Act.

(2) Proceedings under the Child Protective Act.

(3) Involuntary termination proceedings wherein the State of Idaho or any agency of the State is a moving party.

(c) Extradition proceedings.

(d) All indigent defendants who have filed Post Conviction proceedings.

(e) Appeals of all categories of cases listed above through the final appeal, through District Court. This shall not include appeals to the Supreme Court, or the Court of Appeals, as they are now handled by the State Appellate Public Defender's Office, Boise, Idaho.

(f) All indigent defendants charged with probation violations.

(g) All criminal proceedings pursuant to Criminal Rule 35 and other related motions and proceedings including jury trials wherein the Public Defender is appointed to represent indigent defendants.

(h) All misdemeanor proceedings in Franklin County.

3. **Services Excluded.**

The following services are excluded from the contract:

(a) Civil Contempt Proceedings.

(b) Adoption proceedings.

(c) Involuntary termination proceedings except as specified in paragraph 2(b)(3).

(d) Appeals to the United States Supreme Court and Court of Appeals; and all Federal Court Proceedings.

(e) Parole revocations proceedings, and hearings or proceedings of any kind before the Idaho Commission of Pardons and Paroles.

(f) Civil indigence claims.

(g) Civil claims or defense of civil claims by or against clients of the Office Of The Public Defender, except as otherwise specifically provided in the Agreement.

(h) Defense of any criminal charges against clients of the Office Of The Public Defender charged or arising outside Franklin County, except that the Office Of The Public Defender may cooperate and assist proper officials in other jurisdictions in resolving such criminal charges as part of a common agreement regarding joint disposition of such other charges and those matters in which the client is represented by the Office Of The Public Defender.

(i) Conflict cases involving First Degree Murder, where the death penalty is sought (i.e., capital cases).

(J) Cases involving First Degree Murder, non - death penalty cases or capital cases to be paid to the Public Defender by Franklin County as we see forth in Paragraph 9 herein.

(k) Conflict cases as set forth herein above.

4. **Representation.**

Representation will be made at all stages of the proceedings until completed. The Office Of The Public Defender shall include necessary representations of such indigent person in matters of investigation, trial preparation, preparation and filing of motions, arguments of motions, and motions, briefing and argument on appeals and any re-trails following an appeal. This includes preparation of all briefs, documents, letters, research and any and all things regarded as necessary to adequately represent the indigent person.

Representation will at all times comply with the standards mandated by the United States Constitution of the State of Idaho, the laws of the State of Idaho, and ethical standards of the America Bar Association and the Idaho State Bar,

5. **Indigent Persons.**

An indigent person shall include any person determined by a judge within Franklin County to be entitled to legal representation at public expense, pursuant to the laws and the Constitution of the State of Idaho and United States Constitution. The County agrees to provide personnel and standards for the screening of persons requesting counsel, with recommendations to go to the judges of the Sixth District for final determination.

6. **Interview Schedule.**

For clients who are in custody, the Office Of The Public Defender shall attempt to provide initial contacts with clients personally, by telephone, or email within ninety-six (96) hours, or whenever possible within five (5) working days of notification of appointment.

For clients who are not in custody, the Office Of The Public Defender shall attempt to make initial contact with clients within ten (10) working days for the purpose of discussing the client's case,

7. **Conflict Of Interest.**

If at any time after an appointment has been made, the Office Of The Public Defender determines that because of conflict of interest, assignment of qualified legal counsel outside the Office Of The Public Defender is necessary to provide adequate and competent representation in a particular matter or matters, the Public Defender may immediately notify the court making the assignment in which the matter is pending, the County Attorney, and the County Commissioners of Franklin County. If the court finds that such conflict requires appointment of counsel outside of the Office Of The Public Defender, these cases shall be referred to conflict counsel. The court shall appoint conflict counsel to act in such matters, pursuant to Idaho Code § 19-856 and § 19-

860 and other applicable laws on such terms and conditions as may be appointed by the court.

8. **Terms of this Agreement.**

The duration of this Agreement shall be from October 1, 2012, through September 30, 2017. Further, the Office Of The Public Defender and Franklin County shall be entitled to exercise and additional five year option under the terms of the same Agreement for continuation of legal services through the year 2022, subject to renegotiation of the compensation for said contract.

9. **Payment For Services.**

The appropriation for the Office Of The Public-Defender shall be a total sum of five thousand dollars and no cents ($5,970.25) per month, for the fiscal year beginning October 1, 2012, through September 30, 2017.

That in addition to the foregoing sums, the defense of any defendant charged with First Degree Murder shall be evaluated and negotiated on a case by case basis with regard to hourly rates, necessary resources, and a maximum amount per defendant.

All payments shall be due on the last working day of each month, and shall be paid by the 1st day of each month, beginning with November 1, 2012, for services provided for the proceeding month.

Furthermore, there shall be an automatic cost of living increase in the monthly amount of Three Percent (3%) for each year of the contract, commencing October 1, 2013, and each year thereafter.

10. **Costs and Expenses.**

The Office Of The Public Defender shall pay for all costs, fees and expenses incurred in

providing services pursuant to this Agreement, except for the following, which shall be paid by Franklin County, unless otherwise ordered to be paid by the State, or County:

(a) Witness fees and expenses, including expert witnesses.

(b) Depositions.

(c) Transcripts.

(d) Service of Process fees.

(e) Costs of medical and psychiatric evaluations when ordered or approved by the Court.

(f) Costs of investigative services and for evaluations of evidence when ordered or approved by the court.

11. **Malpractice Insurance.**

The Office Of The Public Defender shall carry malpractice insurance, at its expense, during the entire the entire period of the Agreement, in the amount of at least Five Hundred Thousand Dollars and no/100 ($500,000.00) for each attorney.

12. **Non-Privileged Information.**

All clients served by this Agreement shall be advised by the appointing judge that information regarding their financial circumstances which would be probative or determining indigence is not privileged information and will be disclosed to any judge, the prosecuting attorney of this District, or Office Of The Public Defender, upon appropriate request. The Office Of The Public Defender shall have no duty to investigate the financial circumstances of any client served by this Agreement, nor to disclose such information in the absence of a specific request by a judge or prosecuting attorney of this District.

13. **Record Keeping and Reporting.**

The Office Of The Public Defender shall maintain individual case records on each appointed client which shall be available for inspection by the Administrative Judge for the judicial district of the trial court administrator or the trial court administrator, upon request.

14. **Notice To The Office Of the Public Defender.**

All notices of appointment of clients for representation by the Office Of The Public Defender, shall be made by contact with the Marler Law Office, P.O. Box 6369, Pocatello, Idaho 83205-6369. Notification of appointment to represent clients should be made by telephone to (208) 478-7600, and/or fax to (208) 478-7605.

All subsequent notices should be provided directly to the attorney of record representing the particular client, or when no attorney appears of record, by notice to the Office Of The Public Defender at the above address.

15. **Authorization For Private Practice.**

Attorneys providing services under this Agreement may undertake representation of person charged with a crime in this or any other jurisdiction for a fee. Attorney's providing services under this Agreement who are independent of Marler Law Office, may undertake representation of persons charged with a crime for a fee, provided that such representation does not conflict with the representation of indigent clients. Private representation of clients for a fee shall not be accepted by an attorney providing services under this Agreement where any representation is reasonably likely to lead to a conflict of interest with a matter arising under this Agreement which would require of counsel outside of the Office Of The Public Defender.

16. **Modification.**

Any modification of the Agreement shall be in writing and approved by all parties. There are no parole agreements accompanying this Agreement.

17. **Agreement Disputes.**

Any dispute relating to this Agreement shall be resolved through recourse first with the District Judges of the Sixth Judicial District, who shall act collectively as a body in any determination with regard to the dispute and second by appropriate legal remedies, if necessary.

18. **Termination of Agreement.**

Franklin may terminate this Agreement with the Office Of The Public Defender immediately for good cause shown at any time. All cases assigned prior to termination for cause shall be completed pursuant to the Agreement unless representation is assumed by its successor attorney with approval of the appropriate court; provided that all services provided after the date of termination shall be compensated at a rate as may be agree upon, or in the event of no agreement then at the rate as established by prior agreement between the county and The Office Of The Public Defender, utilizing current counsel's current hourly rate as a basis for the rate.

"Good Cause" required for immediate termination shall mean failure of the Office Of The Public Defender to comply with the terms of this Agreement to the extent that the delivery of services to clients is impaired or rendered impossible, or willful disregard by The Office Of The Public Defender of the rights and best interest of the clients resulting in impairment of the rights and interests of the clients. Individual actions of the Office Of The Public Defender, or any one attorney taken in connection with one case alone, shall not necessary constitute "good cause" for removal.

The Office Of The Public Defender may withdrawal from this Agreement at any time without penalty if for any reason the Office Of The Public Defender determines that it is unable to provide adequate and competent representation to the clients assigned under this Agreement, provided that the Office Of The Public Defender shall give at least one-hundred twenty (120) days written notice of its intent to withdraw and the reason therefore, and provide further that the Office Of The Public Defender will not be allowed to withdraw from any case assigned under the terms of this Agreement in which the rights of interests of clients would be impaired. Withdrawal shall be deemed a termination of this Agreement as of the effective date of the notice of withdrawal.

**DATED** this 31st day of October, 2012.

Don T. Marler

Franklin County Commissioners

Counties where defendants are represented at arraignment:

Yes:

1. Ada
2. Bonner (usually)
3. Camas (usually)
4. Canyon
5. Jerome (usually)
6. Twin Falls

No:

7. Adams
8. Bannock
9. Bear Lake
10. Benewah
11. Bingham
12. Bonneville
13. Boundary
14. Butte
15. Caribou
16. Cassia
17. Clark
18. Clearwater
19. Custer
20. Elmore
21. Idaho
22. Fremont
23. Franklin
24. Gem
25. Gooding
26. Kootenai
27. Latah
28. Lemhi
29. Lewis
30. Madison
31. Minidoka
32. Nez Perce
33. Oneida
34. Owyhee
35. Payette
36. Shoshone
37. Teton
38. Washington

**EXHIBIT F**

No Information:

39. Blaine
40. Boise
41. Jefferson
42. Lincoln
43. Power
44. Valley

LAWRENCE G. WASDEN
ATTORNEY GENERAL

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Attorney for Defendant C.L. "Butch" Otter

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA**

| | |
|---|---|
| TRACY TUCKER, et al., on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. MOLLY HUSKEY, *et al.*, in their official capacities as member of the Idaho State Public Defense Commission,<br><br>Defendants. | **Case No. CV OC 1510240**<br><br>**MOTION TO DISMISS** |

Defendants (1) the State of Idaho, (2) the Governor of Idaho, the Hon. C.L. "Butch" Otter, and (3) the seven members of the Idaho State Public Defense Commission hereby move pursuant to Idaho Rule of Civil Procedure 12(b) to dismiss the Class Action Complaint for Injunctive and Declaratory Relief. This Motion to Dismiss is supported by an accompanying Memorandum in Support of Motion to Dismiss.

DATED this 8th day of July, 2015.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
MICHAEL S. GILMORE
Deputy Attorney General
Attorney for Defendants other than
Governor Otter

OFFICE OF THE GOVERNOR

By _____
CALEB YOUNGER
Attorney for Governor Otter

---

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8th day of July, 2015, I caused to be served a true and correct copy of the foregoing by the following method to:

Richard Eppink
American Civil Liberties Union of Idaho Foundation
P.O. Box 1897
Boise, ID 83701
- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Facsimile: 208-344-7201
- [x] Email: reppink@acluidaho.org

Jason D. Williamson
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
- [x] U.S. Mail
- [ ] Hand Delivery
- [ ] Facsimile: 212-549-2654
- [x] Email: jwilliamson@aclu.org

Andrew C. Lillie
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1200 Seventeenth Street
Denver, CO 80202
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_____
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Attorney for Defendant C.L. "Butch" Otter

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA**

| | |
|---|---|
| TRACY TUCKER, et al., on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. MOLLY HUSKEY, et al., in their official capacities as members of the Idaho State Public Defense Commission,<br><br>Defendants. | **Case No. CV OC 1510240**<br><br>**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** |

Defendants (1) the State of Idaho, (2) the Governor of Idaho, the Hon. C.L. "Butch" Otter, and (3) the seven members of the Idaho State Public Defense Commission file this Memorandum in Support of their Motion to Dismiss the Class Action Complaint for Injunctive and Declaratory Relief. This Memorandum first reviews the Complaint, then explains why no relief can be granted against any of the named Defendants.

## REVIEW OF THE COMPLAINT

The Complaint is brought for the purpose of vindicating rights to the effective assistance of counsel under the Federal and State Constitutions. Complaint, ¶¶ 3, 25, 59, 92, 162, 171, 173, 175, 178, 180, 182, 183. It names four Plaintiffs that it proposes as class representatives. All four named Plaintiffs appeared in court in response to a criminal complaint accusing the Plaintiff of a crime for which he or she could be imprisoned if convicted. Complaint, ¶¶ 4-7. Although each of the named Plaintiffs alleged that he or she could not afford bail, none of them alleged that he or she was indigent for purposes of appointment of counsel; one of them alleged indigence in the context of not being able to afford an expert. *Id.*, ¶ 78.[1]

The first named Plaintiff is Tracy Tucker. The Complaint alleges: (1) Mr. Tucker was arrested in Bonner County, had bail set at $40,000 at an initial appearance in which he was not represented by counsel, could not afford to post bond, was held in jail awaiting trial, was represented at arraignment by a "substitute" attorney who was unfamiliar with his case and who did not advocate in his favor, was able to contact his public defender only three times for a total of 20 minutes before a scheduled trial, eventually pleaded guilty rather than go to trial, and awaits sentencing; and (2) Bonner County pays its public defenders under a fixed fee annual contract. Complaint, ¶¶ 4, 63-67, 110, 117, 118, 126, 129, 156.

The second named Plaintiff is Jason Sharp. The Complaint alleges: (1) Mr. Sharp was arrested in Shoshone County, had bail set at $50,000 at an initial appearance in which he was not represented by counsel, could not afford to post bond, later had bail reduced to $5,000, again could not afford to post bond, was later released from jail while awaiting trial through the efforts of his employer and without the assistance of the public defender, has been unable to obtain discovery materials from his public defender, has not been able to persuade his public defender to file substantive motions in his behalf, has met with his public defender for only 90 minutes

[1] It would not be productive to dwell on the lack of allegations of indigence entitling Plaintiffs to the services of appointed counsel because it seems likely that this omission can be cured. If Plaintiffs file affidavits of indigence or an Amended Complaint alleging indigence before oral argument on the Motion to Dismiss, Defendants will not raise any procedural objections to treating the Complaint as though it had alleged that the named Plaintiffs were indigent for purposes of appointment of counsel.

over 13 months, and is scheduled to go to trial; and (2) Shoshone County pays its public defenders under a fixed fee annual contract. Complaint, ¶¶ 5, 68-74, 111, 115, 126, 130, 157.

The third named Plaintiff is Naomi Morley. The Complaint alleges: Ms. Morley was arrested in Ada County, had a public defender present at her initial video appearance when bail was set at $15,000 (but had not been able to speak with the public defender, who later determined that he had a conflict of interest and could not represent her), could not afford to post bond, remained in jail for three weeks until her bail was reduced, was told by her conflict counsel that she would have to pay for expert drug testing services herself, obtained on her own (and without the assistance of conflict counsel) an affidavit from another person indicating that drugs found in Ms. Morley's car were not Ms. Morley's, has been unable to communicate with conflict counsel about her comments to the police investigation or about her scrapped car, and fears that conflict counsel will not be able to adequately prepare for trial because of his workload. Complaint, ¶¶ 6, 75-79, 112, 117, 127, 130, 133, 158.

The fourth named Plaintiff is Jeremy Payne. The Complaint alleges: (1) Mr. Payne was jailed in Payette County, had bail set at $30,000 at an initial appearance in which he was not represented by counsel, could not afford to post bond, remained in jail for over four months until the State failed to timely take his case to trial, met with his public defender outside of court only twice during that time, has not been able to discuss discovery or strategy with his public defender, who in turn has not been able to meaningfully investigate his case, and is scheduled for trial after waiving his preliminary hearing; and (2) Payette County pays its public defenders under a fixed daily rate contract. Complaint, ¶¶ 7, 80-84, 113, 126, 129, 136, 142, 159.

The named Defendants are: (1) the State of Idaho, Complaint, ¶ 85; (2) Governor C.L. "Butch" Otter, ¶ 86; and (3) the seven members of the Idaho Public Defense Commission, ¶ 87. The Defendants are more fully described as follows:

(1) The State of Idaho is a sovereign State. Idaho Admission Act, 26 Stat. L. 215, ch. 656. Section 1 of that Act "declared Idaho to be a State of the United States of America ...admitted into the Union on equal footing with the original States" and "the constitution which the

people of Idaho have formed for themselves ... is hereby accepted, ratified and confirmed." Article XVIII of the Idaho Constitution that was accepted, ratified and confirmed by Congress was titled "County Organization"; § 5 of Article XVIII provided for the Legislature to establish a system of County government; § 11 provided that "County, township, and precinct officers shall perform such duties as shall be prescribed by law." Section 22 of the Idaho Admission Act provided that "All acts or parts of acts in conflict with the provisions of this act, whether passed by the legislature of said territory or by Congress, are hereby repealed."

(2) The Governor, who is sued in his official capacity, holds a constitutional office in the Executive Department of Idaho State Government. The supreme Executive Power is vested in the Governor. Idaho Constitution, Article IV, §§ 1 and 5.

(3) The Idaho Public Defense Commission, whose seven members are sued in their official capacities, is an agency of the Executive Department created by statute and located in the Department of Self-Governing Agencies.[2] The Public Defense Commission has a duty to promulgate rules for criminal defense attorney training and data reporting and to make recommendations to the Legislature for legislation regarding public defender issues.[3]

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[2] Idaho Code § 19-849(1), a section of the Idaho Public Defense Act, creates the State Public Defense Commission and provides that it consists of the following members:

> **§ 19-849. State public defense commission.** — (1) There is hereby created in the department of self-governing agencies the state public defense commission. The commission shall consist of seven (7) members as follows:
>
> (a) Two (2) representatives from the state legislature that shall include one (1) member from the senate and one (1) member from the house of representatives;
>
> (b) One (1) representative appointed by the chief justice of the Idaho supreme court; and
>
> (c) Four (4) representatives appointed by the governor and confirmed by the senate as follows:
>
> (i) One (1) representative from the Idaho association of counties;
>
> (ii) One (1) representative who has experience as a defending attorney;
>
> (iii) One (1) representative from the office of the state appellate public defender; and
>
> (iv) One (1) representative from the Idaho juvenile justice commission.

[3] Idaho Code § 19-850(1), another section of the Idaho Public Defense Act, imposes the following duties on the Commission:

> **§ 19-850. Powers and duties of the state public defense commission.** — (1) The state public defense commission shall:
>
> (a) Promulgate rules in accordance with the provisions of chapter 52, title 67, Idaho Code, establishing the following:

Statute provides for the Boards of County Commissioners to provide for indigent criminal defense.[4] No statute gives the Governor or the Public Defense Commission supervisory authority over persons who provide indigent public defender services or the County officers who are required by statute to provide for such services. Perhaps that is why the Complaint does not seek injunctive relief against the Governor or members of the Public Defense Commission. Excluding the Complaint's requests for class certification, attorneys' fees and "any other" relief, the Complaint has the following Prayers for Relief against ***the State*** (or against no one in parti-

---

(i) Training and continuing legal education requirements for defending attorneys, which shall promote competency and consistency in case types including, but not limited to, criminal, juvenile, abuse and neglect, post-conviction, civil commitment, capital and civil contempt; and

(ii) Uniform data reporting requirements for the annual reports submitted pursuant to section 19-864, Idaho Code. The data reported shall include caseload, workload and expenditures.

(b) On or before January 20, 2015, and by January 20 of each year thereafter as deemed necessary by the commission, make recommendations to the Idaho legislature for legislation on public defense system issues including, but not limited to:

(i) Core requirements for contracts between counties and private attorneys for the provision of indigent defense services and proposed model contracts for counties to use;

(ii) Qualifications and experience standards for the public defender and defending attorneys;

(iii) Enforcement mechanisms; and

(iv) Funding issues including, but not limited to:

1. Training and continuing legal education for defending attorneys;
2. Data collection and reporting efforts; and
3. Conflict cases.

(c) Hold at least one (1) meeting in each calendar quarter.

[4] Idaho Code § 19-859, also a section of the Idaho Public Defense Act, imposes upon County Commissioners the obligation to provide for indigent criminal defense and prohibits "fixed-fee" contracts:

**§ 19-859. Public defender authorized — Joint county public defenders.** — The board of county commissioners of each county shall provide for the representation of indigent persons and other individuals who are entitled to be represented by an attorney at public expense. The board of county commissioners of each county shall provide this representation by one (1) of the following:

(1) Establishing and maintaining an office of public defender;

(2) Joining with the board of county commissioners of one (1) or more other counties within the same judicial district to establish and maintain a joint office of public defender pursuant to an agreement authorized under section 67-2328, Idaho Code;

(3) Contracting with an existing office of public defender; or

(4) Contracting with a defending attorney, provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney. The contract provisions of this subsection shall apply to all contracts entered into or renewed on or after the effective date of this act.

cular), not against the Governor or the members of the Public Defense Commission:

B) Declare that the ***State of Idaho*** is obligated to provide constitutionally adequate representation to indigent criminal defendants, including at their initial appearances;

C) Declare that the constitutional rights of Idaho's indigent criminal defendants are being violated ***by the State*** on an ongoing basis, and provide a deadline for ***the State*** to move this Court for approval of specific modifications to the structure and operation of ***the State's*** indigent-defense system;

D) Enjoin ***the State*** from continuing to violate the rights of indigent defendants by providing constitutionally deficient representation;

E) Enter an injunction requiring ***the State*** to propose, for this Court's approval and monitoring, a plan to develop and implement a statewide system of public defense that is consistent with the U.S. Constitution and the Constitution and laws of the State of Idaho;

F) Enter an injunction that requires ***the State*** to propose, for this Court's approval and monitoring, uniform workload, performance, and training standards for attorneys representing indigent criminal defendants in the State of Idaho in order to ensure accountability and to monitor effectiveness;

G) Enter an injunction barring the use of fixed-fee contracts in the delivery of indigent defense services in the State of Idaho;

Complaint, p. 53.

For the reasons explained in the following Argument, none of these Prayers for Relief can be granted ***against any of the named Defendants***, so the Complaint should be dismissed for failure to state a claim upon which relief can be granted ***against any of the named Defendants***.

## ARGUMENT

First, Defendants acknowledge the seriousness of the issues that Plaintiffs describe in their Complaint. The rights of indigent criminal defendants to the effective assistance of counsel provided at public expense are recognized by case law under the State and Federal Constitutions and underlie the Idaho Public Defense Act. Those rights are judicially enforceable in individual criminal defendants' cases. The Complaint, however, proposes a judicially unmanageable and unenforceable solution to the problems that it identifies. That is why Defendants move to dismiss. This Argument first explains why the Federal claims ***against these Defendants*** should be dismissed, then why the State law claims ***against these Defendants*** should also be dismissed.

## I. The Complaint Does Not State a Claim Upon Which Relief May Granted Under Federal Law

The Sixth Amendment, which is part of the Bill of Rights, does not directly apply to the States. "[T]he Bill of Rights curtail[s] only activities by the Federal Government, see *Barron v. Mayor and City Council of Baltimore*, 7 Pet. 243 (1833), but the Fourteenth Amendment subjects state and local governments to the most important of those restrictions ... ." *Oliver v. United States*, 466 U.S. 170, 187, 104 S.Ct. 1735, 1746 (1984). The Sixth Amendment, which provides indigents a right to effective assistance of counsel, applies to prosecutions in State courts through the Fourteenth Amendment. *Missouri v. Frye*, 566 U.S. —, —, 132 S.Ct. 1399, 1404 (2012).

The second sentence of Section 1 of the Fourteenth Amendment is the vehicle through which the Sixth Amendment is applied to the States:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 1 does not itself create a right to sue to vindicate Federal rights; § 5 gives that power to Congress, which "shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." 42 U.S.C. § 1983 was enacted pursuant to Congress's power under § 5. *Hafer v. Melo*, 502 U.S. 21, 28, 112 S.Ct. 358, 363 (1991). Section 1983 is the presumptive vehicle under which persons may sue to vindicate their Federal rights. *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 119-120, 125 S.Ct. 1453, 1458 (2005). Indeed, Plaintiffs sued under § 1983, Complaint ¶¶ 3, 172, 179, which provides in relevant part:

> **§ 1983. Civil action for deprivation of rights**
>
> Every ***person*** who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless

> a declaratory decree was violated or declaratory relief was unavailable. ...

(Emphasis added; provisions relating to the District of Columbia and the Territories omitted.) Section 1983 is a powerful vehicle for vindicating Federal rights, but its reach does not go beyond what it authorizes.

**A. The State of Idaho Is Not a "Person" Subject to Suit Under § 1983, So the Federal Claims Against the State Must Be Dismissed**

Section 1983 authorizes suits against a "person." A State is not a "person" and cannot be sued under § 1983: "We find nothing substantial in the legislative history that leads us to believe that Congress intended that the word 'person' in § 1983 included the States of the Union." *Will v. Michigan Department of State Police*, 491 U.S. 58, 69, 109 S.Ct. 2304, 2311 (1989). Thus, *Will* affirmed dismissal of a suit against an agency of the State of Michigan because a State is not a "person" who can be sued under § 1983. *Id.* at 71, 109 S.Ct. at 2312. See also *Miller v. Idaho State Patrol*, 150 Idaho 856, 862, 252 P.3d 1274, 1281 (2011) (same).

*Will* and *Miller* were suits for damages, not for declaratory and injunctive relief. However, *Will's* reasoning that the State is not a "person" who can be sued under § 1983 did not depend on whether the suit was in law or equity, and the same reasoning applies to suits for injunctive and declaratory relief. "When a litigant seeks injunctive relief [under § 1983] that involves a state agency's unlawful or unauthorized act, he must sue some individual in authority at that agency, not the agency itself." *Leachman v. Dretke*, 261 S.W.3d 297, 305 (Tex.App. 2008), citing *Will*, 491 U.S. at 71, n.10, 109 S.Ct. at 2312, n.10. "Plaintiff's prospective federal claims under § 1983 and § 1988 seek only declaratory relief and attorney fees. These claims must, however, be asserted only against 'persons' within the meaning of § 1983. The state itself is not such a person." *Lucchese v. State*, 807 P.2d 1185 (Colo. App. 1990), citing *Will*. Thus, the State of Idaho is not a person who can be sued under § 1983, and the Federal claims against it must be dismissed for failure to state a claim upon which relief can be granted.

## B. The Governor and the Members of the Public Defense Commission Are Not Persons Against Whom the Requested Relief Under the Federal Claims Can Be Granted, So the Federal Claims Against Them Must Be Dismissed

*Will's* seemingly harsh rule that the State is not a "person" who may be sued under § 1983 is ameliorated by its footnote 10, which stated: "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." *Will*, *supra*, 491 U.S. at 71, 109 S.Ct. at 2312 (internal punctuation omitted), citing *Kentucky v. Graham*, 473 U.S. 150. 167, n.14, 105 S.Ct. 3099, 3106, n.14, and *Ex parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-454 (1908). However, the ability to sue ***some*** State or local state actors in their official capacities for injunctive relief under § 1983 does not mean that this Complaint has sued the ***proper*** officials. As *Leachman* noted, a plaintiff "must sue some individual in authority in the agency," not merely any State officer. None of the Defendants sued here are an "individual in authority" for the task of providing public defender services for the indigent.

To begin, the Complaint does not allege any acts or omissions in which the Governor was personally involved that resulted in a denial of effective assistance of counsel to any of the four named Plaintiffs. See Complaint, ¶ 86, which contains only legal conclusions that the Governor "bears ultimate responsibility for the provision of constitutionally mandated services to the people of Idaho" and has supervisory authority over the Idaho Criminal Justice Commission. As explained in the following pages, these legal conclusions are incorrect.[5] The same is true for the members of the Public Defense Commission — the Complaint has no allegations of fact that any one of them was personally responsible for acts or omissions that resulted in a denial of effective assistance of counsel to any of the four named Plaintiffs. See Complaint ¶ 87 (summarizing the Commission's statutory duties under Idaho Code § 19-850(1), *supra*, n.3).

---

[5] On a motion to dismiss for failure state a claim upon which relief can be granted, Defendants accept the Complaint's allegations of fact, but are not bound by its conclusions of law. *Owsley v. Idaho Industrial Comm'n*, 141 Idaho 129, 136, 106 P.3d 455, 462 (2005) ("to survive a 12(b) motion to dismiss, it is not enough for a complaint to make conclusory allegations ... the non-movant is entitled to have his factual assertions treated as true, ... this privilege does not extend to the conclusions of law the non-movant hopes the court to draw from those facts").

Of course, the Governor and Commission members have ***political*** or ***governmental interests*** in improving Idaho's indigent defense system, but they have no ***legal authority*** to address the system as requested in the Complaint. The Complaint implicitly concedes this point because its Prayers for Relief do not ask for the Governor or Commission members to be enjoined at all. The Complaint was wise not to seek injunctive relief against the Governor or the Commission members. That is because individual state officers sued for injunctive relief in their official capacities under § 1983 must have some connection with the enforcement of the laws at issue.

Complaints under § 1983 frequently sue Governors for injunctive relief, and Governors are dismissed almost as frequently because they usually have no direct connection to enforcement of the law in question. *E.g.*, when the Governor of California was sued over a statute that made it illegal to sell foie gras produced by force feeding ducks, the Governor was dismissed as a defendant because he had no direct connection with enforcement of the law:

> *Ex Parte Young* ... allows citizens to sue state officers in their official capacities for prospective declaratory or injunctive relief ... for their alleged violations of federal law. The state official must have some connection with the enforcement of the act. That connection must be fairly direct; a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit. Here, Governor Brown is entitled to Eleventh Amendment immunity because his only connection to § 25982 is his general duty to enforce California law.

*Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013), *cert. denied* — U.S. —, 135 S.Ct. 398 (2014) (internal punctuation and citations omitted; two paragraphs reformatted as one).

Although Governor Brown's dismissal was based upon Eleventh Amendment immunity from suit, not upon failure to state a claim upon which relief can be granted, the result is the same: If the Governor had been involved in enforcing the law in question, there would have been no Eleventh Amendment immunity against suit in Federal Court, and the Court would have proceeded to the merits to address whether the Complaint stated a claim upon which relief can be granted. But no relief was possible because the Governor did not enforce the law in question,

and an injunction against him would not have benefited the Plaintiffs. See also *Ariz. Contractors Ass'n v. Napolitano*, 526 F.Supp.2d 968, 983 (D. Ariz. 2007) ("[t]he Act does not charge the Governor with any specific duty, and her general duty to ensure that the laws are faithfully executed is not sufficient to make her a party to this challenge"), *aff'd on other grounds*, 558 F.3d 856 (9th Cir. 2008), *aff'd*, — U.S. —, 131 S.Ct. 1968 (2011); *Snoeck v. Brussa*, 153 F.3d 984, 986-987 (9th Cir. 1998) (members of judicial discipline commission could not be sued over Nevada Supreme Court rules prohibiting disclosure of facts in complaints against judicial officers and allowing Supreme Court to hold persons who disclose such facts in contempt because commission members had no power to change the rules and no contempt power). In the cases just cited there were no injuries in fact caused by or redressable by the defendants; these essential elements of standing were absent. In short, the defendants were legal strangers to the controversies and were named simply as placeholders for the State, a pleading devise that attempted to circumvent the principle that States are not persons under § 1983.

Like the Governors in *Canards* and *Arizona Contractors* and the judicial discipline commissioners in *Snoeck*, Governor Otter and members of the Public Defense Commission do not directly control, regulate, administer, or otherwise bear responsibility for provision of public defender services, and they have no ability to provide the requested relief. They are legal strangers to the Federal claims. The Federal claims against them should be dismissed.

## II. The Complaint Does Not State a Claim Upon Which Relief Can be Granted Under State Law

There are Federal cases directly or very nearly on point because Federal case law has developed in thousands of published opinions under § 1983. In candor, the State law issues that the Complaint presents are open questions, and the parties will be arguing from cases that are less than perfect analogies. For that reason, this part of the argument will address policy as well as law in order to flesh out the bare constitutional text.

### A. Under the Idaho Rules of Civil Procedure, the District Court Does Not Have Authority to Enjoin the State

Statute provides for Counties to administer indigent defense programs. See Idaho Code § 19-859, n.4, *supra*. The Complaint's Prayers for Relief, however, see page 6, *supra*, ask the Court to entangle itself in the actions of another branch of government by enjoining, approving and monitoring policy changes that can only be achieved by legislation, namely, by the Court:

- "provid[ing] a deadline for the State to move ... for approval of specific modifications to the structure and operation of the State's indigent-defense system," Prayer C;
- enjoining the State "to propose, for this Court's approval and monitoring, a plan to develop and implement a statewide system of public defense," Prayer E; and
- enjoining the State "to propose, for this Court's approval and monitoring, uniform work-load, performance, and training standards for attorneys representing indigent criminal defendants," Prayer F.

There are no statutes requiring what these Prayers request or tasking any officers to do what these Prayers request; the only way to achieve the requested relief is by new legislation.

Thus, this case could present serious separation-of-powers issues concerning the District Court's authority to enjoin the "State," which would require the Court in effect to enjoin the Legislature to pass new statutes "for this Court's approval." Happily, the Idaho Rules of Civil Procedure make it unnecessary to reach these separation-of-powers issues, and the Court need not address them. This is consistent with the principle of constitutional avoidance. "The general rule of constitutional avoidance encourages courts to interpret statutes so as to avoid unnecessary constitutional questions." *Miller v. Idaho State Patrol*, 150 Idaho 856, 864, 252 P.3d 1274, 1282 (2011). By analogy, the principle of constitutional avoidance should also apply to Court Rules.

The Civil Rules in question are 3(b) and 65(d). They provide:

> **Rule 3(b). Designation of party**
>
> ... Provided, all civil actions by or against a governmental unit or agency, ... shall designate such party in its governmental ... name only, and individuals constituting the governing boards of governmental units ... shall not be designated as parties in any capacity unless the action is brought against them ***individually or for relief under Rules 65 or 74.***

**Rule 65(d). Form and scope of injunction or restraining order**

> Every order granting an injunction ... shall be specific in terms; shall describe in reasonable detail ... the act or acts sought to be restrained; and ***is binding only on the parties to the action***, their officers, agents, servants, and attorneys, and upon those persons in active concert or participation with them, who receive actual notice of the order by personal service or otherwise.

(Emphasis added.)

*Weyyakin Ranch Property Owners' Association, Inc. v. City of Ketchum*, 127 Idaho 1, 896 P.2d 327 (1995), holds that the general rule that suit is brought against a government entity in the name of that governmental entity and not against its officers does not apply when the suit is for an injunction. To obtain an injunction, Rule 3(b) requires the Complaint to name specific officers to be enjoined; naming only the governmental entity violates the rule.

> This action for injunctive relief pursuant to I.R.C.P. 65 ... sought to enjoin the "City of Ketchum" from taking any further action to complete the proposed annexation. ***The designation of the "City of Ketchum," rather than the elected officials individually, violates I.R.C.P. 3(b).*** Because the temporary restraining orders failed to name the elected officials individually, the trial court never obtained jurisdiction over them, and therefore did not have the authority to find them in contempt.

127 Idaho at 2-3, 896 P.2d at 328-329 (emphasis added).

It is obvious, despite the Complaint naming as Defendants the Governor and members of the Public Defense Commission, that neither the Governor nor the Commission have statutory or constitutional authority to tell the County officers who operate Idaho's indigent defense system how to operate the system. The only State entity that can change the system in the way requested by the Prayers for Relief is the Idaho Legislature, which is not named as a Defendant and which under Rule 65(d) would not be bound by any injunction entered by the District Court.[6] Pursuant

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[6] It is almost certain that an injunction requiring the Legislature to pass legislation on a specific topic that would be subject to the District Court's approval and monitoring would violate separation of powers. Article II, § 1, of the Idaho Constitution provides:

> **§ 1. Departments of government.** — The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others,

to Rules 3(b) and 65 and *Weyyakin* all requests for injunctive relief against the State should be dismissed for failure to comply with Rule 3(b).

**B. The Court Does Not Have Authority to Issue a Declaratory Ruling Against the State Because There Is No Justiciable Controversy Between Plaintiffs and the State**

The Civil Rules' prohibition against issuing an injunction against the State leaves open the issue of whether declaratory judgment can be entered against the State. The availability of declaratory judgment alone against the State is not explicitly addressed by the Rules or in the case law. The Court may assume without deciding that there may be cases in which a District Court can enter declaratory judgment against the State and/or the Legislature, *e.g.*, when the Constitution itself imposes an affirmative legislative duty upon the State. See Article IX, § 1 ("it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools"); *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993) (Legislature among defendants sued for declaratory and injunctive relief under Article IX, § 1).

Plaintiffs' state law claims here are based upon Article I, § 13, which is constitutionally

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except as in this constitution expressly directed or permitted.

The Legislative Power includes the power to decide what legislation will be considered or enacted. "§ 5 [of the Fourteenth Amendment] is a positive grant ***of legislative power*** authorizing Congress ***to exercise its discretion in determining whether and what legislation is needed*** to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-1724 (1966).

An injunction requiring enactment of specific legislation or legislation on a specific subject would violate separation of powers (assuming that the Constitution does not explicitly require legislation on that topic). "[T]he broader rule is that mandamus will not lie to compel the Legislature to enact any legislation. A separation of powers does allow for some incidental overlap of function. But a judicially compelled enactment of legislation is not an incidental overlap; it is the very exercise of legislative power itself." *County of San Diego v. State*, 164 Cal.App.4th 580, 594, 79 Cal.Rptr.3d 489, 501, *review denied* (2008) (decided under California's similar separation-of-powers article). Also *Cedar County Committee v. Munro*, 134 Wash.2d 377, 380, 950 P.2d 446, 447 (1998) ("the creation of a new county is an exercise of legislative power ...; the Legislature cannot be compelled to form a new county") (decided under Washington's similar separation-of-powers article). These cases are of academic interest, however, because the Idaho Rules of Civil Procedure do not allow an injunction to be issued against the State, and these separation-of-powers issues need not be addressed.

Further, naming the State as a defendant also has other serious separation-of-powers issues. "It is the general rule that, under the doctrine of sovereign immunity, a governmental unit can only be sued upon its consent," and that, "such consent is evidenced by the state constitution or a legislative mandate." *Sanchez v. State, Dept. of Correction*, 143 Idaho 239, 244, 141 P.3d 1108, 1113 (2006). Rule 3(b) avoids the constitutional issue of whether this Court can "waive" sovereign immunity.

unlike Article IX, § 1: The former puts no affirmative duties on the State or any State officer while the latter puts an affirmative duty on the Legislature. Article I, § 13, provides:

> **§ 13. Guaranties in criminal actions and due process of law.** — In all criminal prosecutions, the party accused shall [1] have the right to a speedy and public trial; [2] to have the process of the court to compel the attendance of witnesses in his behalf, and [3] to appear and defend in person and with counsel.
>
> No person shall [4] be twice put in jeopardy for the same offense; nor [5] be compelled in any criminal case to be a witness against himself; nor [6] be deprived to life, liberty or property without due process of law.

Section 13 creates at least six sets of constitutional rights for defendants in criminal cases, as noted by the bracketing above. But § 13 does not place any duty on the "State." If § 13 impliedly imposes any duties upon the "State," all of the rights involved would be asserted in a criminal proceeding, and the only branch of State government present in all State criminal proceedings is the Judiciary, so presumably any duties created in one of the branches of State government would be duties for presiding judges, not for the Legislative or Executive Branches.[7]

Be that as it may, the determination of whether Plaintiffs are entitled to declaratory judgment comes from the Declaratory Judgment Act itself and the cases decided under it, not from the preceding paragraph's and the footnote's speculations. The Idaho Declaratory Judgment Act provides that "Courts of record ...shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." Idaho Code § 10-1201. However, declaratory judgments can only be issued in justiciable controversies:

> Idaho courts have the power to declare the rights, status and legal relations of persons .... I.C. § 10-1201 ...
>
> An important limitation upon this jurisdiction is that, "a de-

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[7] If the "State" has duties under a part of § 13, then does it also have duties under all of § 13? For example, should the "State" be responsible for monitoring all District Judges, Magistrates, Prosecuting Attorneys, and public defenders to assure that (1) all defendants have speedy and public trials, (2) all defendants have process to compel witnesses, (3) no defendant is subject to double jeopardy, and (4) no defendant's right against self-incrimination is violated?

Many officers in addition to public defenders are implicated by § 13's constitutional rights. There is no principled distinction under which monitoring public defenders can be separated from monitoring trial judges and prosecutors. What State officer can do that under our constitutional system? No one.

> claratory judgment can only be rendered in a case where an actual or justiciable controversy exists." This concept precludes courts from deciding cases which are purely hypothetical or advisory.
>
> *State v. Rhoades*, 119 Idaho 594, 597, 809 P.2d 455, 458 (1991) (internal citation omitted).

*Wylie v. State*, 151 Idaho 26, 31, 253 P.3d 700, 705 (2011).

One aspect of justiciability is redressability. *In re Jerome County Bd. of Com'rs*, 153 Idaho 298, 308, 281 P.3d 1076, 1086 (2012). Redressability is an essential element of justiciability — without the possibility of judicial redress, a judgment or order is an advisory opinion.

> Therefore, courts will not rule on declaratory judgment actions which present questions that are moot or abstract. An action for declaratory judgment is moot where the judgment, if granted, would have no effect either directly or collaterally on the plaintiff, the plaintiff would be unable to obtain further relief based on the judgment and no other relief is sought in the action.

*Wylie*, 151 Idaho at 31, 253 P.3d at 705 (citations and quotation marks omitted). As *Wylie* further observed: "Turning to the question of justiciability, Wylie has been unable to articulate how a judgment declaring the Ordinance invalid would provide him any relief," so Wylie's request for declaratory judgment was not justiciable. 151 Idaho at 34, 253 P.3d at 708.

The situation here is similar. Rule 3(b) precludes injunctive relief against the State for Plaintiffs' benefit. A declaratory ruling against the State would therefore not provide judicial relief for Plaintiffs. Accordingly, there is no justiciable controversy between Plaintiffs and the State, and Plaintiffs are simply asking the Court for an advisory opinion. In fact, the Declaratory Judgment Act has codified the principle that the Court need not issue an advisory opinion.

> **§ 10-1206. When court may refuse judgment or decree.** — The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

If ever there were a situation calling for the application of § 10-1206 and for the Court's refusal to enter declaratory judgment against the State, this is it. There is a statutory framework

in place by which public defender services are provided by the Counties. Plaintiffs' concerns are addressed by that statutory framework, which provides a robust right of representation:

> **§ 19-852. Right to counsel of indigent person — Representation at all stages of criminal and commitment proceedings — Payment.** — (1) An indigent person who is being detained by a law enforcement officer, ... or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled:
>
> (a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled; and
>
> (b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The attorney, services and facilities and the court costs shall be provided at public expense to the extent that the person is, at the time the court determines indigency pursuant to section 19-854, Idaho Code, unable to provide for their payment.
>
> (2) An indigent person who is entitled to be represented by an attorney under subsection (1) of this section is entitled:
>
> (a) To be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney and including revocation of probation;
>
> (b) To be represented in any appeal;
>
> (c) To be represented in any other post-conviction or post-commitment proceeding that the attorney or the indigent person considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.
>
> (3) An indigent person's right to a benefit under subsection (1) or (2) of this section is unaffected by his having provided a similar benefit at his own expense, or by his having waived it, at an earlier stage.

Plaintiffs are not objecting to these State laws; they are objecting that the laws are not being followed. Rather than "slog" through the work of addressing individual problems in individual Counties or groups of Counties, whose populations range from fewer than 1,000 residents

to greater than 400,000, and whose on-the-ground practical administrative solutions surely cannot be applied Statewide, Plaintiffs want this Court to issue a "cookie cutter" declaration that the State must fix everything even though no "cookie cutter" response can do so.

In essence, Plaintiffs want this Court to issue a declaration and injunction to the State that it must make Counties follow the law. There are two central problems with this. The first is obvious: The Counties are not parties to the lawsuit, and Plaintiffs are suing the State as a proxy for the Counties. If Plaintiffs have identified problems with the Counties' administration of the law, suing the State is not the solution. The second is that courts do not issue injunctions "to obey the law": "But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 435-436, 61 S.Ct. 693, 699 (1941). Yet Prayers B through F are little more than requests to enjoin the State against ever allowing a violation of the law governing indigent defense. That should not be the basis for declaratory or injunctive relief.

The State closes this part of its argument with some practical prudential and jurisprudential considerations. For 125 years of Idaho statehood, Counties or other local units of government have provided whatever indigent defenses were provided at the trial level. The Idaho Constitution, which Congress approved in the Idaho Admission Act, contemplated that Counties would provide many governmental services required by law. No decision of the Supreme Court of the United States has ever held that the Sixth Amendment, the Fourteenth Amendment, or § 1983 required a State to take on or to supervise provision of indigent defense services throughout a State. No decision of the Idaho Supreme Court has ever required the State to take on or to supervise the provision of indigent defense services throughout the State under State law.

Plaintiffs' requested relief would affect not only public defenders; it would affect how every District Judge and every Magistrate conduct criminal trials and hearings. In the abstract, one District Judge has the legal authority to issue judgments and orders that would affect how

every County, every other District Judge, and every Magistrate administer indigent defense, even if there are no controlling decisions of the Supreme Court of the United States or of the Supreme Court of Idaho requiring the District Judge to do so. But that is not the best way to develop the law from a prudential or jurisprudential standpoint. A decision to restructure how every County and trial court provides indigent defense — if it were ever to be made — should not come without review of the Idaho Supreme Court (and perhaps the United States Supreme Court) because of its extraordinary implications for all of the Counties and trial courts in the State. That is yet another reason why the State law claims against the State should be dismissed.

### C. The Governor and the Members of the Public Defense Commission Are Not Persons Against Whom the Requested Relief Under the State Law Claims Can Be Granted, So the State Law Claims Against Them Should Be Dismissed

This Memorandum explained why the Governor and Members of the Public Defense Commission could not be enjoined under Federal law at pp. 9-11, *supra*. The argument and cases were based upon the Federal law, but the same underlying reasoning also applies to the State law claims: Neither the Governor nor the Commission members can be enjoined to perform duties they do not have. The State law claims against them should also be dismissed.

## CONCLUSION

All of Plaintiffs' Federal and State law claims should be dismissed for failure to state a claim upon which relief can be granted ***against these Defendants***.

DATED this 8th day of July, 2015.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
MICHAEL S. GILMORE
Deputy Attorney General
Attorney for Defendants other than Governor Otter

OFFICE OF THE GOVERNOR

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of July, 2015, I caused to be served a true and correct copy of the foregoing by the following method to:

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ORIGINAL

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. MOLLY HUSKEY, *et al.*, in their official capacities as member of the Idaho State Public Defense Commission,

Defendants.

**Case No. CV OC 1510240**

**MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING DECISION ON MOTION TO DISMISS**



TG

Defendants move this Court under Rule 26(a) of the Idaho Rules of Civil Procedure to issue a protective order staying discovery pending a decision on Defendants' Motion to Dismiss, filed July 8, 2015. This motion is supported by an accompanying Memorandum in Support of Motion for Protective Order Staying Discovery Pending Decision on Motion to Dismiss.

DATED this 21st day of August, 2015.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
W. SCOTT ZANZIG
Deputy Attorney General
Attorney for Defendants other than Governor Otter

OFFICE OF THE GOVERNOR

By _____
CALLY YOUNGER
Attorney for Governor Otter

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August, 2015, I caused to be served a true and correct copy of the foregoing by the following method to:

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA**

| | |
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| TRACY TUCKER, et al., on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. MOLLY HUSKEY, *et al.*, in their official capacities as members of the Idaho State Public Defense Commission,<br><br>Defendants. | **Case No. CV OC 1510240**<br><br>**MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING DECISION ON MOTION TO DISMISS** |



TG

Defendants file this Memorandum in Support of their motion for a protective order staying discovery pending the Court's decision on Defendants' motion to dismiss, which they filed July 8, 2015.

## BACKGROUND

Plaintiffs filed this case on June 17, 2015, contending that the public defense systems in Idaho's counties fail to provide indigent criminal defendants with adequate representation, in violation of their federal and state constitutional rights. Although Idaho statutes require Idaho's counties to provide defense to indigent defendants, Plaintiffs did not sue the counties or their commissioners. Instead, they sued the State, the Governor, and the commissioners of the Public Defense Commission.

Defendants responded to the complaint on July 8 by filing a Rule 12(b) motion to dismiss. The motion raises purely legal arguments primarily centered on justiciability. It contends that none of the defendants Plaintiffs chose to name are proper defendants. The motion is based on the following legal principles:

- The State of Idaho is not a "person" subject to suit under 42 U.S.C. § 1983, and thus cannot be sued for violating Plaintiffs' federal constitutional rights;
- The other defendants – Governor Otter and the members of the Public Defense Commission – cannot be sued for the relief requested under section 1983, or for alleged violations of Plaintiffs' state constitutional rights, because they have no legal authority to make the sweeping changes to Idaho's public defense system Plaintiffs request; and
- Plaintiffs' complaint fails to state a claim upon which relief can be granted against the State under state law, because the Court lacks authority to enjoin the State and there is no justiciable controversy between the State and Plaintiffs.

All these matters raised in the motion are legal issues to be resolved by the briefing on the motion to dismiss.

After Defendants moved to dismiss, Plaintiffs served discovery requests. Plaintiffs

served all Defendants with interrogatories, requests for admission, and requests for documents. Plaintiffs also noted the depositions of two non-party witnesses. Copies of Plaintiffs' discovery requests are attached as appendices to this brief.

**ARGUMENT**

This Court has discretion to stay discovery pending the outcome of the motion to dismiss. Rule 26(d) of the Idaho Rules of Civil Procedure empowers the Court to make orders regarding the timing and sequence of discovery. The Idaho Supreme Court has made clear that "[c]ontrol of discovery is within the discretion of the trial court." *Avila v. Wahlquist*, 126 Idaho 745, 749 890 P.2d 331, 335 (1995) (citing *Service Employees Int'l Union, Local 6 v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 761, 683 P.2d 404, 409 (1984)). In *Service Employees*, the Court upheld the trial court's decision to suspend discovery pending the outcome of a "motion to dismiss [that] raised purely legal issues." *See* 106 Idaho at 761, 683 P.2d at 409. If an entire case can be resolved by a dispositive motion pending before the court, it is particularly appropriate for the court to exercise its discretion to stay discovery. *See Taylor v. AIA Servs. Corp.*, 151 Idaho 552, 570-71, 261 P.3d 829, 847-48 (2011) (upholding district court's decision to stay discovery pending resolution of dispositive motion, "especially since th[e] motion for summary judgment could have been dispositive of the entire case").

There are good reasons for the Court to stay discovery until it resolves Defendants' pending motion to dismiss. If the Court grants the motion, it will dispose of the entire case. No discovery is necessary to resolve the motion, because it raises purely legal issues. The Court should consider no evidence outside the pleadings in deciding the motion. "'The only facts which a court may properly consider on a motion to dismiss for failure to state a claim are those appearing in the complaint, supplemented by such facts as the court may properly judicially notice.'" *Taylor v. McNichols,* 149 Idaho 826, 833, 243 P.3d 642 (2010) (quoting *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Idaho App. 1990)).

Plaintiffs will not be prejudiced if discovery is stayed pending the outcome on the motion

to dismiss. If any of Plaintiffs' claims survive the motion, there will be plenty of time for Plaintiffs to conduct discovery before trial or summary judgment, neither of which has even been scheduled.

In contrast, permitting discovery before the Court rules on the motion to dismiss would impose unnecessary and undue burdens on Defendants. The burden is unnecessary because Defendants' motion to dismiss should resolve the entire case on purely legal grounds. There is no need for depositions, document productions, and written discovery at this point. And the burden would be substantial. For example, Plaintiffs have requested information and documents dating back to 2010. *See, e.g.,* Document Request No. 1 (requesting all documents relating to the provision of indigent defense services in Idaho since 2010). Other requests have no time limits. *See, e.g.,* Document Request No. 12 (requesting all documents relating to the absence of counsel at indigent defendants' initial appearances in Idaho). At least one request applies to *any* State official. *See* Document Request No. 24 (requesting "all documents relating to any informal or formal complaints or other information provided or conveyed by *state officials* relating to Idaho's indigent defense system and funding for that system, since the passage of the Idaho Public Defense Act in 2014") (emphasis added).

Moreover, discovery at this point would impose additional burdens on members of the Public Defense Commission, who also serve in other capacities. For example, both the Hon. Molly Huskey and Sara B. Thomas have served as the State Appellate Public Defender since 2010. Plaintiffs' requests would encompass many privileged communications from the Defendants' public defense work. Their current counsel in this case from the Attorney General's office would be unable to assist them in document review and production, because the Attorney General serves as prosecutor in those appellate cases handled by the State Appellate Public Defender. Those Defendants would bear the entire burden of an enormous amount of document review that may be entirely unnecessary if the Court grants the motion to dismiss. All Defendants except William Wellman serve or have served in legislative, judicial, or other

governmental positions.[1] They similarly would be required to scour all their records from these positions to comply with the demands of Plaintiffs' discovery requests. Moving full-speed ahead with discovery now would unreasonably burden Defendants, who maintain that Plaintiffs have failed to state a claim upon which relief can be granted.

## CONCLUSION

There is no good reason to force Defendants to undertake the burdens of discovery while their motion to dismiss is pending. Defendants respectfully request that the Court exercise its discretion to enter a protective order staying all discovery until the Court resolves the pending motion to dismiss.

DATED this 21st day of August, 2015.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
W. SCOTT ZANZIG
Deputy Attorney General
Attorney for Defendants other than Governor Otter

OFFICE OF THE GOVERNOR

By _____
CALLY YOUNGER
Attorney for Governor Otter

[1] During the relevant time period, Hon. Molly Huskey has served as a district judge. Sara Thomas has served on the Criminal Justice Commission. Rep. Darrel Bolz, Sen. Chuck Winder, and Rep. Christy Perry have served in the legislature. Kimber Ricks has served as a county commissioner. William Wellman has served as a defending attorney.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August, 2015, I caused to be served a true and correct copy of the foregoing by the following method to:

| | |
|---|---|
| Richard Eppink<br>American Civil Liberties Union of Idaho Foundation<br>P.O. Box 1897<br>Boise, ID 83701 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 208-344-7201<br>☒ Email: reppink@acluidaho.org |
| Jason D. Williamson<br>American Civil Liberties Union Foundation<br>125 Broad St.<br>New York, NY 10004 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 212-549-2654<br>☒ Email: jwilliamson@aclu.org |
| Andrew C. Lillie<br>Hogan Lovells US LLP<br>One Tabor Center, Suite 1500<br>1200 Seventeenth Street<br>Denver, CO 80202 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 303-899-7333<br>☒ Email: andrew.lillie@hoganlovells.com |
| Kathryn M. Ali<br>Hogan Lovells US LLP<br>555 Thirteenth St. NW<br>Washington, DC 20004 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 202-637-5600<br>☒ Email: Kathryn.ali@hoganlovells.com |
| Bret H. Ladine<br>Hogan Lovells US LLP<br>3 Embarcadero Center #1500<br>San Francisco, CA 94111 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 415-374-2499<br>☒ Email: bret.ladine@hoganlovells.com |
| Jenny Q. Shen<br>Hogan Lovells US LLP<br>4085 Campbell Ave., Ste. 100<br>Menlo Park, CA 94025 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile:<br>☒ Email: jenny.shen@hoganlovells.com |

W. SCOTT ZANZIG
Deputy Attorney General

# APPENDIX A

PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS

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*Pro hac vice applications pending*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

## PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS

Pursuant to Rules 26 and 33 of the Idaho Rules of Civil Procedure, Plaintiffs Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne (collectively, "Plaintiffs"), by and through their undersigned attorneys, hereby request that Defendants, the State of Idaho, Governor C.L. "Butch" Otter, and Idaho State Public Defense Commissioners Molly Huskey, Darrell G. Bolz, Sara B. Thomas, William H. Wellman, Kimber Ricks, Chuck Winder, and Christy Perry ("Defendants") answer, in writing, and under oath the following interrogatories and serve such answers upon counsel for Plaintiffs.

## DEFINITIONS AND INSTRUCTIONS

In addition to the definitions and instructions set forth in Rules 26 and 33 of the Idaho Rules of Civil Procedure, the following definitions and instructions apply to each of the discovery requests set forth herein and are deemed to be incorporated in each of the requests.

### Definitions

1. The present tense includes the past and future tenses.

2. The term "document," as used herein, means the original and all non-identical copies of any handwritten, printed, typed, recorded, or graphic or photographic material of any kind and nature, including all drafts thereof and all mechanical or electronic sound recordings or transcripts thereof, however produced or reproduced, and including, but not limited to, accounting materials, accounts, agreements, analyses, appointment books, books of account, calendars, catalogs, checks, computer data, computer disks, computer generated or stored information, computer programming materials, contracts, correspondence, date books, diaries, diskettes, drawings, electronic-mail ("e-mail") messages, faxes, guidelines, instructions, inter-

office communications, invoices, ledgers, letters, licenses, logs, manuals, memoranda, metadata, microfilm, minutes, notes, opinions, payments, plans, receipts, records, regulations, reports, sound recordings, statements, studies, surveys, telegrams, telexes, timesheets, vouchers, word processing materials (however stored or maintained) and working papers, and all other means by which information is stored for retrieval in fixed form.

3. The term "communication," as used herein, means and includes any transmission or exchange of information between two or more persons, whether orally or in writing, and including but not limited to any conversation or discussion by means of letter, note, memorandum, telephone, telegraph, telex, telecopier, fax transmission, cable, e-mail, or any other medium.

4. The terms "relate to," "related to," "relating to," and "regarding," as used herein, mean mentioning, citing, quoting, involving, representing, constituting, discussing, reflecting, identifying, describing, referring to, containing, enumerating, evidencing, supporting, or in any way concerning, in whole or in part, directly or indirectly.

5. The term "person," as used herein, shall mean any natural person, corporation, and any other form of business entity, including, but not limited to, partnerships, joint ventures, and associations, and shall include directors, officers, owners, members, employees, agents, attorneys, or anyone else acting on the person's behalf.

6. The terms "and" and "or," as used herein, are to be construed conjunctively or disjunctively, as necessary, to make the request inclusive rather than exclusive.

7. The terms "any" and "all," as used herein, shall mean "any and all," and shall be construed so as to bring within the scope of the request any information that otherwise might be construed to be outside its scope.

8. The term "describe," as used herein, means to state all facts of which you are aware concerning the subject, including, but not limited to, identifying any dates, any person involved in or with knowledge of the subject, and any places or locations relevant to the subject.

9. The term "identify," as used herein, means:

a. In connection with persons, to give, to the extent known, the person's full name, present or last known address, and, when referring to a natural person, the present or last known place of employment;

b. In connection with a document, to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipient(s);

c. In connection with an oral statement or communication, to the extent known, to (i) state when and where it was made; (ii) identify each of the makers and recipients thereof, in addition to all others present; (iii) indicate the medium of communication; and (iv) state the substance of the statement or communication.

10. The terms "you," "your," and "Defendants," as used herein, shall mean the State of Idaho, Governor C.L. "Butch" Otter, Commissioner Molly Huskey, Commissioner Darrell G. Bolz, Commissioner Sara B. Thomas, Commissioner William H. Wellman, Commissioner Kimber Ricks, Commissioner Chuck Winder, Commissioner Christy Perry, and each and every former, present, and future commissioner and officer of the Idaho State Public Defense Commission.

11. The terms "public defender" or "public defenders" shall mean any attorney or attorneys providing legal services to an "indigent person," as that term is defined at Idaho Code § 19-851(4), who is under formal charge of having committed, or is being detained under a conviction of a "serious crime," as that term is defined at Idaho Code § 19-851(5), as well as any attorney or attorneys providing legal services to a "juvenile," as that term is defined at Idaho Code § 20-502(11), who is under formal charge of having committed, or who has been adjudicated for commission of, an act, omission or status that brings her or him under the purview of the Juvenile Corrections Act (Idaho Code §§ 20-501 *et seq.*).

12. The terms "county commissioner" or "county commissioners" shall mean any member or members of a board of county commissioners as described in Idaho Code Ann. § 31-701 – 31-718.

**Instructions**

1. These interrogatories are continuing in character so as to require you to supplement your answers and responses promptly if you obtain additional information. Supplemental answers and responses shall be served on Defendants within a reasonable time, as set forth in Rule 26(e) of the Idaho Rules of Civil Procedure.

2. If you encounter or claim the existence of any ambiguities construing a definition, instruction, or interrogatory herein, set forth the matter deemed ambiguous and the construction used in responding.

3. Unless otherwise indicated, no interrogatory herein limits the scope of any other interrogatory.

4. All interrogatories (and any requests for the production of documents) are to be answered on the basis of your knowledge and belief, and/or the knowledge and belief of your agents and attorneys.

5. If any information furnished in an answer is not within your personal knowledge, identify each person who has personal knowledge of the information furnished in such answer and each person who communicated to you any part of the information furnished.

6. Where a claim of privilege is asserted in responding or objecting to an interrogatory, state the factual basis for the claim of privilege, including (1) the date of the subject document or communication; (2) the identity of the author, preparer, or the person responsible for the communication, including without limitation, the author's, preparer's, or responsible person's name, address, employment, and title; (3) the identities of each person who was sent or had access to or custody of the document or communication, together with an identification by employment of each such person; (4) the location of the document (if applicable); and (5) a summary of the document's or communication's subject matter in sufficient detail to enable an evaluation of the claim of privilege.

7. All interrogatories must be answered in full and in writing. If any interrogatory cannot be answered fully after exercising reasonable diligence, please so state and answer each such interrogatory to the fullest extent you deem possible; specify the portion of each

interrogatory that you claim to be unable to answer fully and completely; state the facts upon which you rely to support your contention that you are unable to answer the interrogatory fully and completely; and state what knowledge, information, or belief you have concerning the unanswered portion of each such interrogatory.

8. If any interrogatory is objected to with respect to only a part of the interrogatory, fully answer the remaining parts of the interrogatory to which you have not objected.

**INTERROGATORIES**

1. Identify the state official(s), other than the Governor and the Idaho Public Defense Commission, with the authority to ensure that indigent defendants are receiving representation that meets state and federal constitutional standards.

2. Describe, in detail, any and all efforts undertaken by Defendants to address state oversight of public defense delivery in Idaho since the passage of the Idaho Public Defense Act in 2014.

3. Describe, in detail, any recommendations proposed by the Idaho Public Defense Commission to the Idaho state legislature on the provision of indigent defense in Idaho including, but not limited to, funding and enforcement issues, since the passage of the Idaho Public Defense Act in 2014.

4. Describe, in detail, any communications between the Idaho Public Defense Commission and individual county commissioners related to funding and/or staffing problems since the passage of the Idaho Public Defense Act in 2014.

5. Describe, in detail, any proposals by the Governor's Office to contribute funding to the provision of trial-level indigent defense services prior to or since the passage of the Idaho Public Defense Act in 2014.

6. Describe, to the best of your knowledge, the method by which each of Idaho's 44 counties funds its indigent defense system.

7. Identify which entity or entities are charged with ensuring compliance with the requirement, pursuant to Idaho Code Ann. § 19-860(1), that "[s]o far as is possible, the compensation paid to [] public defender[s] shall not be less than the compensation paid to the county prosecutor for that portion of his practice devoted to criminal law."

8. Identify which entity or entities are charged with ensuring compliance with the requirement, pursuant to Idaho Code Ann. § 19-8629(1), that "[t]he board of county commissioners of each county shall annually appropriate enough money to administer the program of representation."

9. Describe, in detail, any efforts undertaken by Defendants to bring public defender caseloads within Idaho into compliance with the national standards set by the National Legal Aid & Defender Association and/or American Bar Association.

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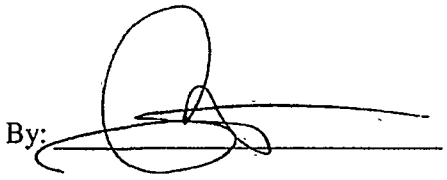
Dated: July 24 2015

By: 

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*Attorneys for Plaintiffs*

# APPENDIX B

PLAINTIFFS' FIRST SET OF DOCUMENT REQUESTS TO DEFENDANTS

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

## PLAINTIFFS' FIRST SET OF DOCUMENT REQUESTS TO DEFENDANTS

Pursuant to Rules 26 and 34 of the Idaho Rules of Civil Procedure, Plaintiffs Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne (collectively, "Plaintiffs"), by and through their undersigned attorneys, hereby request that Defendants, the State of Idaho, Governor C.L. "Butch" Otter, and Idaho State Public Defense Commissioners Molly Huskey, Darrell G. Bolz, Sara B. Thomas, William H. Wellman, Kimber Ricks, Chuck Winder, and Christy Perry ("Defendants") produce for inspection and copying the requested documents described below.

## DEFINITIONS AND INSTRUCTIONS

In addition to the definitions and instructions set forth in Rules 26 and 34 of the Idaho Rules of Civil Procedure, the following definitions and instructions apply to each of the discovery requests set forth herein and are deemed to be incorporated in each of the requests.

### Definitions

1. The present tense includes the past and future tenses.

2. The term "document," as used herein, means the original and all non-identical copies of any handwritten, printed, typed, recorded, or graphic or photographic material of any kind and nature, including all drafts thereof and all mechanical or electronic sound recordings or transcripts thereof, however produced or reproduced, and including, but not limited to, accounting materials, accounts, agreements, analyses, appointment books, books of account, calendars, catalogs, checks, computer data, computer disks, computer generated or stored information, computer programming materials, contracts, correspondence, date books, diaries, diskettes, drawings, electronic-mail ("e-mail") messages, faxes, guidelines, instructions, inter-

office communications, invoices, ledgers, letters, licenses, logs, manuals, memoranda, metadata, microfilm, minutes, notes, opinions, payments, plans, receipts, records, regulations, reports, sound recordings, statements, studies, surveys, telegrams, telexes, timesheets, vouchers, word processing materials (however stored or maintained) and working papers, and all other means by which information is stored for retrieval in fixed form.

3. The term "communication," as used herein, means and includes any transmission or exchange of information between two or more persons, whether orally or in writing, and including but not limited to any conversation or discussion by means of letter, note, memorandum, telephone, telegraph, telex, telecopier, fax transmission, cable, e-mail, or any other medium.

4. The terms "relate to," "related to," "relating to," and "regarding," as used herein, mean mentioning, citing, quoting, involving, representing, constituting, discussing, reflecting, identifying, describing, referring to, containing, enumerating, evidencing, supporting, or in any way concerning, in whole or in part, directly or indirectly.

5. The term "person," as used herein, shall mean any natural person, corporation, and any other form of business entity, including, but not limited to, partnerships, joint ventures, and associations, and shall include directors, officers, owners, members, employees, agents, attorneys, or anyone else acting on the person's behalf.

6. The terms "and" and "or," as used herein, are to be construed conjunctively or disjunctively, as necessary, to make the request inclusive rather than exclusive.

7. The terms "any" and "all," as used herein, shall mean "any and all," and shall be construed so as to bring within the scope of the request any information that otherwise might be construed to be outside its scope.

8. The term "describe," as used herein, means to state all facts of which you are aware concerning the subject, including, but not limited to, identifying any dates, any person involved in or with knowledge of the subject, and any places or locations relevant to the subject.

9. The term "identify," as used herein, means:

a. In connection with persons, to give, to the extent known, the person's full name, present or last known address, and, when referring to a natural person, the present or last known place of employment;

b. In connection with a document, to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipient(s);

c. In connection with an oral statement or communication, to the extent known, to (i) state when and where it was made; (ii) identify each of the makers and recipients thereof, in addition to all others present; (iii) indicate the medium of communication; and (iv) state the substance of the statement or communication.

10. The terms "you," "your," and "Defendants," as used herein, shall mean the State of Idaho, Governor C.L. "Butch" Otter, Commissioner Molly Huskey, Commissioner Darrell G. Bolz, Commissioner Sara B. Thomas, Commissioner William H. Wellman, Commissioner Kimber Ricks, Commissioner Chuck Winder, Commissioner Christy Perry, and each and every former, present, and future commissioner and officer of the Idaho State Public Defense Commission.

11. The terms "public defender" or "public defenders" shall mean any attorney or attorneys providing legal services to an "indigent person," as that term is defined at Idaho Code § 19-851(4), who is under formal charge of having committed, or is being detained under a conviction of a "serious crime," as that term is defined at Idaho Code § 19-851(5), as well as any attorney or attorneys providing legal services to a "juvenile," as that term is defined at Idaho Code § 20-502(11), who is under formal charge of having committed, or who has been adjudicated for commission of, an act, omission or status that brings her or him under the purview of the Juvenile Corrections Act (Idaho Code §§ 20-501 *et seq.*).

12. The terms "County Commissioner" or "County Commissioners" shall mean any member or members of a Board of County Commissioners as described in Idaho Code Ann. § 31-701–31-718.

13. The term "initial appearance" shall mean the first time a person under formal charge of a "serious crime," as that term is defined at Idaho Code § 19-851(5), or of an act, omission, or status that brings her or him under the purview of the Juvenile Corrections Act (Idaho Code §§ 20-501 *et seq.*), appears before a judge regarding the charge.

14. The term "state officials" shall mean any state or county official within the State of Idaho.

## Instructions

1. If any part of a document is responsive to any request, the whole document is to be produced.

2. Any alteration of a responsive document, including any marginal notes, handwritten notes, underlining, date stamps, received stamps, endorsed or filed stamps, drafts, revisions, modifications, and other versions of a final document is a separate and distinct document, and it must be produced.

3. If you file a timely objection to any portion of a request, definition, or instruction, provide a response to the remaining portion as well.

4. The terms defined above, along with the individual requests for production and inspection, should be construed broadly, to the fullest extent of their meaning, in a good faith effort to comply with the Idaho Rules of Civil Procedure.

5. These discovery requests are continuing and require supplemental responses as specified in Idaho Rule of Civil Procedure 26(e) if you (or any person acting on your behalf) obtain additional information called for by the requests between the time of the original response and the time of trial. Each supplemental response must be served on Plaintiffs no later than thirty (30) days after the discovery of the further information, and in no event should any supplemental response be served later than the day before the first day of trial.

6. The fact that a document is produced by another person or entity does not relieve you of the obligation to produce your copy of the same document, even if the two documents are identical in all respects.

7. In producing documents and other materials, you are requested to furnish all documents or things in your possession, custody, or control, regardless of whether such documents or materials are possessed directly by you or your directors, officers, agents, employees, representatives, subsidiaries, managing agents, affiliates, investigators, or by your attorneys or their agents, employees, representatives, or investigators.

8. Documents are to be produced in full. Redacted documents will not constitute compliance with any individual request. If any requested document or thing cannot be produced in full, produce it to the extent possible, indicating which document or portion of that document is being withheld and the reason that document is being withheld.

9. In producing documents, you are requested to produce the original of each document requested, together with all non-identical copies and drafts of that document. If the original of any document cannot be located, a copy must be provided in lieu thereof, and must be legible and bound or stapled in the same manner as the original.

10. Documents must be produced in the file folder, envelope, or other container in which the documents are kept or maintained by you. If, for any reason, the container cannot be produced, produce copies of all labels or other identifying marks.

11. Documents must be produced in such fashion as to identify the department, branch, or office in whose possession it was located and, where applicable, the natural person in whose possession it was found and the business address of each document's custodian(s).

12. Documents attached to each other should not be separated.

13. Documents not otherwise responsive to this discovery request must be produced if such documents mention, discuss, refer to, or explain the documents that are called for by this discovery request, or if such documents are attached to documents called for by this discovery request and constitute routing slips, transmittal memoranda, letters, comments, evaluations, or similar materials.

14. If any documents requested herein have been lost, discarded, destroyed, or are otherwise no longer in your possession, custody, or control, or have been transferred voluntarily or involuntarily to another person or persons, or otherwise disposed of, they must be identified as completely as possible including, but not limited to, information necessary to identify the document and the following information: the date of disposal or transfer, the manner of disposal or transfer, the reason for disposal or transfer, the person authorizing the disposal or transfer, and the person disposing of or transferring the document.

15. If you claim the attorney-client privilege or any other privilege or work product protection for any document, state the factual basis for the claim of privilege, including (1) the date of the subject document or communication; (2) the identity of the author or preparer, including without limitation, the author's or preparer's name, address, employment, and title; (3) the identities of each person who was sent or had access to or custody of the document, together with an identification by employment of each such person; (4) the location of the document (if applicable); and (5) a summary of the document's or communication's subject matter in sufficient detail to enable an evaluation of the claim of privilege.

16. Notwithstanding the assertion of any objection to production, any document as to which an objection is raised containing non-objectionable matter that is relevant and material to a request must be produced. However, that portion of the document for which the objection is asserted may be withheld or redacted, provided that the above-mentioned identification is furnished.

17. If any responsive document is no longer in your possession, custody, or control, identify its current or last known custodian and describe, in full, the circumstances surrounding its disposition from your possession or control. Without limitation to the term "control," as used in this paragraph, a document must be deemed to be in your control if you have the right to secure the document or a copy thereof from another person or entity, public or private, having possession, custody, or control thereof.

**DOCUMENT REQUESTS**

1. All documents and/or studies conducted, drafted, received, and/or published by Defendants relating to the provision of indigent defense services in the State of Idaho since 2010.

2. All documents and/or studies conducted, drafted, received, and/or published by Defendants relating to the length of pre-trial detention for defendants in the State of Idaho since 2010.

3. All documents and/or communications with representatives of the National Legal Aid and Defender Association relating to the provision of indigent defense services in the State of Idaho since 2010.

4. All documents and/or communications with representatives of the Sixth Amendment Center relating to the provision of indigent defense services in the State of Idaho since 2010.

5. All documents and/or communications regarding any alternate legislation or reforms considered by the State of Idaho relating to the provision of indigent defense services since 2010, apart from or in addition to the Idaho Public Defense of Act of 2014.

6. All documents and/or communications relating to any informal or formal complaints or other information received by Defendants since 2010 relating to the funding of indigent defense services and the resources allotted to public defenders in the State of Idaho, including but not limited to, funds to pay investigators or experts.

7. All documents and/or communications relating to any informal or formal complaints or other information received by Defendants since 2010 relating to public defender caseloads in the State of Idaho.

8. All documents and/or communications relating to any formal or informal complaints or other information received by Defendants since 2010 relating to attempts by prosecutors in the State of Idaho to communicate with indigent defendants regarding their pending criminal case without appointed public defense counsel present.

9. All documents and/or communications relating to any formal or informal complaints or other information received by Defendants since 2010 relating to the role of county commissioners in the provision of indigent defense services in the State of Idaho.

10. All documents and/or communications relating to any formal or informal complaints or other information received by Defendants from indigent criminal defendants in Idaho since 2010 relating to the representation provided to them by a public defender.

11. All documents and/or communications received by Defendants since 2010 relating to Idaho indigent defendants' access to and ability to contact or communicate consistently with their assigned counsel, including but not limited to, informal or formal

complaints or other information related to indigent defendants' inability to review discovery or other case-specific materials with their public defender.

12. All documents and/or communications relating to the absence of counsel at indigent defendants' initial appearances in the State of Idaho.

13. All documents and/or communications relating to any informal or formal complaints or other information received by Defendants from indigent defendants in Idaho since 2010 alleging that defendants were forced to pay for the costs of their representation, including, but not limited to, paying for mandated pre-trial drug testing and the costs of expert witnesses.

14. All documents and communications relating to any actual or proposed funding of indigent defense services by the State of Idaho since 2010, including all documents and communications relating to how indigent defense services are funded by each of the 44 counties within the State of Idaho since 2010.

15. All documents relating to the annual funding each county within Idaho has devoted to the provision of indigent defense services for each year since 2010, reported separately for each county.

16. All documents submitted by any county to the central registry and reporting portal established by Idaho Code § 67-450E.

17. All documents and communications relating to any funding the State of Idaho has provided for trial-level indigent defense services since 2010.

18. All documents and communications relating to any supervision or oversight the State of Idaho has provided for trial-level indigent defense services since 2010.

19. All documents and communications relating to any training the State of Idaho has provided for trial-level indigent defense providers since 2010.

20. All documents identifying or relating to, preferably by county, the number of attorneys representing indigent defendants in Idaho, whether on a contractual basis, by appointment of the court, or as a full-time employee of an institutional public defender office, reported separately for each year since 2010.

21. All documents identifying or relating to the number of adult criminal defendants within Idaho who qualify for public defense services, reported separately for each county, for each year since 2010.

22. All documents identifying or relating to the number of juvenile defendants within Idaho who qualify for public defense services, reported separately for each county, for each year since 2010.

23. All documents relating to the average per-year and/or per-month caseload for public defenders in Idaho, reported separately for each county, for each year since 2010.

24. All documents relating to any informal or formal complaints or other information provided or conveyed by state officials relating to Idaho's indigent defense system and funding for that system, since the passage of the Idaho Public Defense Act in 2014.

25. All communications between the Idaho State Public Defense Commission, or any member thereof, and individual county commissioners since the passage of the Idaho Public Defense Act in 2014.

26.

27. All communications between Governor Otter and individual county commissioners since the filing of the above-captioned lawsuit on June 17, 2015, relating to indigent defense services in Idaho.

28. All rules proposed by the Idaho Public Defense Commission for the provision of indigent defense services in Idaho, as well as all drafts of any such rules, and any correspondence and/or records documenting the rulemaking process.

29. All uniform performance standards proposed by the Idaho Public Defense Commission for the provision of indigent defense services in Idaho, as well as all drafts of any such proposals, and any associated correspondence and/or records relating to these proposed standards.

30. All recommendations proposed by the Idaho Public Defense Commission for the provision of indigent defense services in Idaho, as well as all drafts of any such recommendations, and any associated correspondence and/or records relating to these proposed recommendations.

31. All documents and communication relating to any trainings or supervision for public defenders proposed by the Idaho Public Defense Commission.

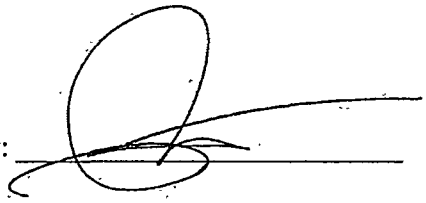
32. All minutes, recordings, or transcripts of meetings held by the Idaho Public Defense Commission.

33. Any and all documents relating to studies, reports, surveys or analysis received, prepared, requested, or requisitioned by the Idaho Public Defense Commission relating to the provision of indigent services in the State of Idaho.

34. All documents identified in your Responses to the Interrogatories or Requests for Admission.

35. All documents relied upon in responding to the Interrogatories or Requests for Admission.

Dated: July 24, 2015

By: 

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*Attorneys for Plaintiffs*

# APPENDIX C

PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANTS

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

## PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANTS

Pursuant to Rules 26 and 36 of the Idaho Rules of Civil Procedure, Plaintiffs Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne (collectively, "Plaintiffs"), by and through their undersigned attorneys, hereby request that Defendants, the State of Idaho, Governor C.L. "Butch" Otter, and Idaho State Public Defense Commissioners Molly Huskey, Darrell G. Bolz, Sara B. Thomas, William H. Wellman, Kimber Ricks, Chuck Winder, and Christy Perry ("Defendants") answer, in writing, and under oath, the following requests for admission and serve such answers upon counsel for Plaintiffs.

## DEFINITIONS AND INSTRUCTIONS

In addition to the definitions and instructions set forth in Rules 26 and 36 of the Idaho Rules of Civil Procedure, the following definitions and instructions apply to each of the discovery requests set forth herein and are deemed to be incorporated in each of the requests.

### Definitions

1. The present tense includes the past and future tenses.

2. The terms "relate to," "related to," "relating to," and "regarding," as used herein, mean mentioning, citing, quoting, involving, representing, constituting, discussing, reflecting, identifying, describing, referring to, containing, enumerating, evidencing, supporting, or in any way concerning, in whole or in part, directly or indirectly.

3. The term "person," as used herein, shall mean any natural person, corporation, and any other form of business entity, including, but not limited to, partnerships, joint ventures, and associations, and shall include directors, officers, owners, members, employees, agents, attorneys, or anyone else acting on the person's behalf.

4. The terms "and" and "or," as used herein, are to be construed conjunctively or disjunctively, as necessary, to make the request inclusive rather than exclusive.

5. The terms "any" and "all," as used herein, shall mean "any and all," and shall be construed so as to bring within the scope of the request any information that otherwise might be construed to be outside its scope.

6. The terms "you," "your," and "Defendants," as used herein, shall mean the State of Idaho, Governor C.L. "Butch" Otter, Commissioner Molly Huskey, Commissioner Darrell G. Bolz, Commissioner Sara B. Thomas, Commissioner William H. Wellman, Commissioner Kimber Ricks, Commissioner Chuck Winder, Commissioner Christy Perry, and each and every former, present, and future commissioner and officer of the Idaho State Public Defense Commission.

7. The terms "public defender" or "public defenders" shall mean any attorney or attorneys providing legal services to an "indigent person," as that term is defined at Idaho Code § 19-851(4), who is under formal charge of having committed, or is being detained under a conviction of a "serious crime," as that term is defined at Idaho Code § 19-851(5), as well as any attorney or attorneys providing legal services to a "juvenile," as that term is defined at Idaho Code § 20-502(11), who is under formal charge of having committed, or who has been adjudicated for commission of, an act, omission or status that brings her or him under the purview of the Juvenile Corrections Act (Idaho Code §§ 20-501 *et seq.*).

8. The terms "county commissioner" or "county commissioners" shall mean any member or members of a board of county commissioners as described in Idaho Code Ann. § 31-701–31-718.

9. The term "initial appearance" shall mean the first time a person under formal charge of a "serious crime," as that term is defined at Idaho Code § 19-851(5), or of an act, omission, or status that brings her or him under the purview of the Juvenile Corrections Act (Idaho Code §§ 20-501 *et seq.*), appears before a judge regarding the charge.

10. The term "state officials" shall mean any state or county official within the State of Idaho.

**Instructions**

1. If you file a timely objection to any portion of a request, definition, or instruction, provide a response to the remaining portion as well.

2. The terms defined above, along with the individual requests for admission, should be construed broadly, to the fullest extent of their meaning, in a good faith effort to comply with the Idaho Rules of Civil Procedure.

3. These discovery requests are continuing and require supplemental responses as specified in Idaho Rule of Civil Procedure 26(e) if you (or any person acting on your behalf) obtain additional information called for by the requests between the time of the original response and the time of trial. Each supplemental response must be served on Plaintiffs no later than thirty (30) days after the discovery of the further information, and in no event should any supplemental response be served later than the day before the first day of trial.

**REQUESTS FOR ADMISSION**

Please admit the following:

1. The Idaho Criminal Justice Commission (CJC) was created by Executive Order in 2005, and operates under the supervision of the Governor.

2. The purpose of the CJC is to provide policy-level direction to State officials and to promote the efficient and effective use of resources, based on best practices or evidence-based practices, for matters related to the State's criminal justice system.

3. The CJC is comprised of at least one representative from the executive, legislative, and judicial branches of Idaho's state government, and consists of 26 total members.

4. Among other required members, the CJC must include a representative from the Governor's office; the state Attorney General or his designee; two members from the Idaho Senate; two members from the Idaho House of Representatives; the Administrative Director of the Courts; three representatives from the judiciary; and one representative from the Office of the Idaho State Appellate Public Defender.

5. In 2009, the CJC formed a Public Defense Subcommittee (Subcommittee) tasked with developing specific recommendations for improvement of Idaho's public defense system.

6. In 2011, Defendant Governor Otter issued Executive Order No. 2011-11, continuing and reaffirming the CJC's mandate.

7. On May 24, 2013, after approximately three years of investigation, the Subcommittee issued a set of public defense reform recommendations to the CJC.

8. Defendant Sarah B. Thomas became Chair of the CJC on or about May 30, 2013, and continues to serve in that capacity at present.

9. In 2008, the CJC, along with the Idaho Juvenile Justice Commission, authorized the National Legal Aid and Defender Association (NLADA) to conduct a comprehensive evaluation of Idaho's trial-level indigent defense services.

10. The CJC identified seven counties to serve as a representative sample of indigent defense systems to be evaluated by the NLADA. These included Ada, Blaine, Bonneville, Canyon, Kootenai, Nez Perce, and Power Counties.

11. In January 2010, the NLADA released the results of its evaluation of trial-level indigent defense systems in Idaho, entitled "The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts."

12. In its January 2010 report, the NLADA determined that none of the indigent defense systems in the sample counties were constitutionally adequate.

13. The NLADA's January 2010 report was made available to and reviewed by representatives of the executive and legislative branches of Idaho state government, including Governor Otter.

14. There are currently no statewide caseload standards for public defenders in Idaho.

15. There are currently no statewide performance standards for public defenders in Idaho.

16. There are currently no specific statewide training requirements for public defenders in Idaho.

17. There is currently no statewide oversight of trial-level indigent defense services being provided to criminal defendants throughout the various counties.

18. There is currently no requirement that public defenders report their individual caseloads to state officials or any court.

19. Aside from the trustee benefit payments allocated to the Idaho Public Defense Commission (PDC) in 2014 to offer limited training for public defense attorneys around the state, the State of Idaho currently provides no funding for trial-level indigent defense services.

20. Pursuant to I.C. sec. 19-862, each board of county commissioners alone is responsible for appropriating enough money to deliver adequate public defense services to indigent defendants being prosecuted in their jurisdiction.

21. County commissioners are not required to have any formal or informal training in the law.

22. A survey conducted by the CJC in 2014 found that indigent defendants are represented by counsel at their initial appearance in only 5 of the 44 counties.

23. A significant number of public defenders in Idaho are not receiving adequate training hours in areas directly relevant to the representation of their indigent clients.

24. According to a recent report by the Idaho Legislative Services Office regarding caseloads, public defenders in some counties are handling more than twice the number of cases they should be.

25. On any given day, there are hundreds, if not thousands, of individuals being prosecuted by the State of Idaho, who qualify for indigent defense services.

26. The majority of individuals charged with either a misdemeanor or felony in Idaho are alleged to have violated state law, rather than a county or municipal ordinance.

27. The State of Idaho does provide funding to county prosecutors' offices throughout the state.

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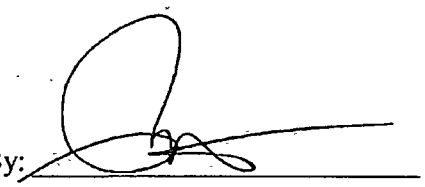
Dated: July 24, 2015

By: 

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*Attorneys for Plaintiffs*

# APPENDIX D

PLAINTIFFS' NOTICE OF DEPOSITION OF IAN H. THOMSON WITH SUBPOENA

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

**PLAINTIFFS' NOTICE OF DEPOSITION OF IAN H. THOMSON**

Pursuant to Rules 30, 45(a), and 45(b) of the Idaho Rules of Civil Procedure, Plaintiffs Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne (collectively, "Plaintiffs"), by and through their undersigned attorneys, will take the deposition of **Ian H. Thomson,** Executive Director, Idaho State Public Defense Commission, to commence at 9:00 a.m. on August 27, 2015. The deposition will take place at **910 West Main Street (Sonna Building), Boise, Idaho 83702,** and will continue from day to day until completed. The deposition will be recorded by stenographic and audio-visual means and will be conducted under oath by an office authorized to take such testimony. The deposition will be taken for the purposes of discovery, for use at trial in this matter, and for any other purpose permitted under the Idaho Rules of Civil Procedure.

The parties are also hereby notified that a subpoena will be served on Ian H. Thomson for the production of documents. A copy of the subpoena is attached.

Dated: August 19, 2015

Respectfully submitted,

**Richard Eppink**

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*Attorneys for Plaintiffs*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

**SUBPOENA**

The State of Idaho to: **Ian H. Thomson,** Executive Director, Idaho State Public Defense Commission, 816 West Bannock Street, Suite 201, Boise, Idaho 83702:

**YOU ARE COMMANDED:**

[ X ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[ X ] to produce or permit inspection and copying of the documents described in Appendix A, including electronically stored information, at the place, date and time specified below.

**910 West Main Street (Sonna Building), Boise, Idaho 83702, August 27, 2015 at 9:00 a.m.**

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this 19th day of August 2015.

By order of the court.

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## APPENDIX A

In addition to the definitions and instructions set forth in Rule 45(i)(2) of the Idaho Rules of Civil Procedure, the following definitions and instructions apply to each of the discovery requests set forth herein and are deemed to be incorporated in each of the requests. Ian H. Thompson is requested to produce to Plaintiffs documents as set forth below by August 27, 2015, at 910 West Main Street (Sonna Building), Boise, Idaho 83702.

### Definitions

1. The present tense includes the past and future tenses.

2. The term "document," as used herein, means the original and all non-identical copies of any handwritten, printed, typed, recorded, or graphic or photographic material of any kind and nature, including all drafts thereof and all mechanical or electronic sound recordings or transcripts thereof, however produced or reproduced, and including, but not limited to, accounting materials, accounts, agreements, analyses, appointment books, books of account, calendars, catalogs, checks, computer data, computer disks, computer generated or stored information, computer programming materials, contracts, correspondence, date books, diaries, diskettes, drawings, electronic-mail ("e-mail") messages, faxes, guidelines, instructions, inter-office communications, invoices, ledgers, letters, licenses, logs, manuals, memoranda, metadata, microfilm, minutes, notes, opinions, payments, plans, receipts, records, regulations, reports, sound recordings, statements, studies, surveys, telegrams, telexes, timesheets, vouchers, word processing materials (however stored or maintained) and working papers, and all other means by which information is stored for retrieval in fixed form.

3. The term "communication," as used herein, means and includes any transmission or exchange of information between two or more persons, whether orally or in writing, and

including but not limited to any conversation or discussion by means of letter, note, memorandum, telephone, telegraph, telex, telecopier, fax transmission, cable, e-mail, or any other medium.

4. The terms "relate to," "related to," "relating to," and "regarding," as used herein, mean mentioning, citing, quoting, involving, representing, constituting, discussing, reflecting, identifying, describing, referring to, containing, enumerating, evidencing, supporting, or in any way concerning, in whole or in part, directly or indirectly.

5. The term "person," as used herein, shall mean any natural person, corporation, and any other form of business entity, including, but not limited to, partnerships, joint ventures, and associations, and shall include directors, officers, owners, members, employees, agents, attorneys, or anyone else acting on the person's behalf.

6. The terms "and" and "or," as used herein, are to be construed conjunctively or disjunctively, as necessary, to make the request inclusive rather than exclusive.

7. The terms "any" and "all," as used herein, shall mean "any and all," and shall be construed so as to bring within the scope of the request any information that otherwise might be construed to be outside its scope.

8. The term "describe," as used herein, means to state all facts of which you are aware concerning the subject, including, but not limited to, identifying any dates, any person involved in or with knowledge of the subject, and any places or locations relevant to the subject.

9. The term "identify," as used herein, means:

a. In connection with persons, to give, to the extent known, the person's full name, present or last known address, and, when referring to a natural person, the present or last known place of employment;

b. In connection with a document, to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s), and recipient(s);

c. In connection with an oral statement or communication, to the extent known, to (i) state when and where it was made; (ii) identify each of the makers and recipients thereof, in addition to all others present; (iii) indicate the medium of communication; and (iv) state the substance of the statement or communication.

10. The terms "you" and "your" as used herein shall mean Ian H. Thomson, Executive Director, Idaho State Public Defense Commission.

11. The term "Defendants," as used herein, shall mean the State of Idaho, Governor C.L. "Butch" Otter, Commissioner Molly Huskey, Commissioner Darrell G. Bolz, Commissioner Sara B. Thomas, Commissioner William H. Wellman, Commissioner Kimber Ricks, Commissioner Chuck Winder, Commissioner Christy Perry, and each and every former, present, and future commissioner and officer of the Idaho State Public Defense Commission.

12. The terms "public defender" or "public defenders" shall mean any attorney or attorneys providing legal services to an "indigent person," as that term is defined at Idaho Code § 19-851(4), who is under formal charge of having committed, or is being detained under a conviction of a "serious crime," as that term is defined at Idaho Code § 19-851(5), as well as any attorney or attorneys providing legal services to a "juvenile," as that term is defined at Idaho Code § 20-502(11), who is under formal charge of having committed, or who has been adjudicated for

commission of, an act, omission or status that brings her or him under the purview of the Juvenile Corrections Act (Idaho Code §§ 20-501 *et seq.*).

13. The terms "County Commissioner" or "County Commissioners" shall mean any member or members of a Board of County Commissioners as described in Idaho Code Ann. § 31-701–31-718.

14. The term "state officials" shall mean any state or county official within the State of Idaho.

## Instructions

1. In responding to these requests for production you should furnish all non-privileged documents (unless such privilege has been waived) that are within your possession, custody, or control, or are within the possession, custody, or control of your agents, employees, representatives, or investigators, and identify all documents known to be responsive to these request or the possession, custody, or control of others by stating (a) who you believe to control such documents, (b) where you believe such documents can be found, (c) the nature of the documents (i.e., letter, e-mail, report, memorandum, etc.), and (d) when you believe such documents to have been created.

2. If, in responding to these requests for production, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in your response.

3. The documents requested must be produced in their entirety, without redaction or alteration, except where necessary to protect privileged material. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If any document or portion of any document covered by this request is withheld from production you must identify each such document or portion of the document, and provide, with respect to each such document or portion thereof, (a) the reason(s) for withholding, (b) the date of the document, (c) the identity of each person who drafted or assisted in the preparation of the document, (d) the identify of each person who received or had access to the document or copies thereof, or to whom any portion of the contents has been communicated, (e) the type of document and a brief description of the nature and subject matter of the document, and (f) a statement of the facts that

constitute the basis for the claim of privilege.

4. If production of any requested document is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

5. Documents should be produced as they are kept in the ordinary course of business. Where possible, organize and label each document or set of documents, indicating by number the request to which the document(s) relates.

6. If any document responding to all or any part of the request for documents is not currently available, include a statement to that effect and furnish whatever documents are available. Include in your statement when such documents were most recently in your possession or subject to your control and what disposition was made of them. Identify the name, job title, and the last known address of each person currently in possession or control of such documents. If any such documents were destroyed, identify the name, job title, and the last known business address of each person who directed that the documents be destroyed, and state the reasons the documents were destroyed.

**Documents to be Produced**

1. All documents related to communications among the Idaho State Public Defense Commission or its staff regarding the provision of indigent defense services in the State of Idaho.

2. All documents related to communications between any members or staff of the Idaho State Public Defense Commission and others, including but not limited to the Governor of Idaho or his office, Idaho legislators, or Idaho counties or their agents, regarding the provision of indigent defense services in the State of Idaho.

3. All documents related to any rules, standards, or recommendations proposed, passed, or considered by the Idaho State Public Defense Commission related to the provision of indigent defense services in the State of Idaho since 2010.

4. All documents related to any trainings or supervision for public defenders proposed by the Idaho State Public Defense Commission.

5. All minutes, recordings, or transcripts of meetings held by the Idaho State Public Defense Commission.

6. All documents relating to studies, reports, surveys or analysis received, prepared, requested, or requisitioned by the Idaho State Public Defense Commission relating to the provision of indigent services in the State of Idaho.

7. All documents related to any legislation assessed by the Idaho State Public Defense Commission related to the provision of indigent defense services in the State of Idaho since 2010.

8. All documents related to any informal or formal complaints received by the Idaho State Public Defense Commission regarding public indigent defense services in the State of Idaho since 2010.

9. All documents related to communications involving you or others at the Idaho State Public Defense Commission regarding this litigation.

10. All documents related to your tour of visits to Idaho's public defenders' offices upon taking your position, including any reports, summaries, or notes.

11. All documents related to communications involving the Idaho State Public Defense Commission and the provision of indigent defense services in the State of Oregon.

# APPENDIX E

PLAINTIFFS' NOTICE OF DEPOSITION OF LISA FULLMER WITH SUBPOENA

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

**PLAINTIFFS' NOTICE OF DEPOSITION OF LISA FULLMER**

Pursuant to Rules 30, 45(a), and 45(b) of the Idaho Rules of Civil Procedure, Plaintiffs Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne (collectively, "Plaintiffs"), by and through their undersigned attorneys, will take the deposition of **Lisa Fullmer,** former Canyon County public defender, to commence at 8:00 a.m. on August 28, 2015. The deposition will take place at **910 West Main Street (Sonna Building), Boise, Idaho 83702,** and will continue from day to day until completed. The deposition will be recorded by stenographic and audio-visual means and will be conducted under oath by an office authorized to take such testimony. The deposition will be taken for the purposes of discovery, for use at trial in this matter, and for any other purpose permitted under the Idaho Rules of Civil Procedure.

The parties are also hereby notified that a subpoena will be served on Lisa Fullmer for the production of documents. A copy of the subpoena is attached.

Dated: August 20, 2015

Respectfully submitted,

**Richard Eppink**

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*Attorneys for Plaintiffs*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

**SUBPOENA**

The State of Idaho to: **Lisa Fullmer, c/o Thompson Law Firm, 78 SW 5th Ave #2, Meridian, ID 83642:**

**YOU ARE COMMANDED:**

[ X ] to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.

[ X ] to produce or permit inspection and copying of the documents described in Appendix A, including electronically stored information, at the place, date and time specified below.

**910 West Main Street (Sonna Building), Boise, Idaho 83702, August 28, 2015 at 8:00 a.m.**

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this 20th day of August 2015.

By order of the court.

**Richard Eppink**
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## APPENDIX A

In addition to the definitions and instructions set forth in Rule 45(i)(2) of the Idaho Rules of Civil Procedure, the following definitions and instructions apply to each of the discovery requests set forth herein and are deemed to be incorporated in each of the requests. Lisa Fullmer is requested to produce to Plaintiffs documents as set forth below by August 28, 2015, at 910 West Main Street (Sonna Building), Boise, Idaho 83702.

### Definitions

1. The present tense includes the past and future tenses.

2. The term "document," as used herein, means the original and all non-identical copies of any handwritten, printed, typed, recorded, or graphic or photographic material of any kind and nature, including all drafts thereof and all mechanical or electronic sound recordings or transcripts thereof, however produced or reproduced, and including, but not limited to, accounting materials, accounts, agreements, analyses, appointment books, books of account, calendars, catalogs, checks, computer data, computer disks, computer generated or stored information, computer programming materials, contracts, correspondence, date books, diaries, diskettes, drawings, electronic-mail ("e-mail") messages, faxes, guidelines, instructions, inter-office communications, invoices, ledgers, letters, licenses, logs, manuals, memoranda, metadata, microfilm, minutes, notes, opinions, payments, plans, receipts, records, regulations, reports, sound recordings, statements, studies, surveys, telegrams, telexes, timesheets, vouchers, word processing materials (however stored or maintained) and working papers, and all other means by which information is stored for retrieval in fixed form.

3. The term "communication," as used herein, means and includes any transmission or exchange of information between two or more persons, whether orally or in writing, and

including but not limited to any conversation or discussion by means of letter, note, memorandum, telephone, telegraph, telex, telecopier, fax transmission, cable, e-mail, or any other medium.

4. The terms "relate to," "related to," "relating to," and "regarding," as used herein, mean mentioning, citing, quoting, involving, representing, constituting, discussing, reflecting, identifying, describing, referring to, containing, enumerating, evidencing, supporting, or in any way concerning, in whole or in part, directly or indirectly.

5. The term "person," as used herein, shall mean any natural person, corporation, and any other form of business entity, including, but not limited to, partnerships, joint ventures, and associations, and shall include directors, officers, owners, members, employees, agents, attorneys, or anyone else acting on the person's behalf.

6. The terms "and" and "or," as used herein, are to be construed conjunctively or disjunctively, as necessary, to make the request inclusive rather than exclusive.

7. The terms "any" and "all," as used herein, shall mean "any and all," and shall be construed so as to bring within the scope of the request any information that otherwise might be construed to be outside its scope.

8. The terms "you" and "your" as used herein shall mean former Canyon County public defender Lisa Fullmer.

9. The terms "public defender" or "public defenders" shall mean any attorney or attorneys providing legal services to an "indigent person," as that term is defined at Idaho Code § 19-851(4), who is under formal charge of having committed, or is being detained under a conviction of a "serious crime," as that term is defined at Idaho Code § 19-851(5), as well as any attorney or attorneys providing legal services to a "juvenile," as that term is defined at Idaho

Code § 20-502(11), who is under formal charge of having committed, or who has been adjudicated for commission of, an act, omission or status that brings her or him under the purview of the Juvenile Corrections Act (Idaho Code §§ 20-501 *et seq.*).

## Instructions

1. In responding to these requests for production you should furnish all non-privileged documents (unless such privilege has been waived) that are within your possession, custody, or control, or are within the possession, custody, or control of your agents, employees, representatives, or investigators, and identify all documents known to be responsive to these request or the possession, custody, or control of others by stating (a) who you believe to control such documents, (b) where you believe such documents can be found, (c) the nature of the documents (i.e., letter, e-mail, report, memorandum, etc.), and (d) when you believe such documents to have been created.

2. If, in responding to these requests for production, you encounter any ambiguities when construing a request or definition, the response shall set forth the matter deemed ambiguous and the construction used in your response.

3. The documents requested must be produced in their entirety, without redaction or alteration, except where necessary to protect privileged material. When a document contains both privileged and non-privileged material, the non-privileged material must be disclosed to the fullest extent possible without thereby disclosing the privileged material. If any document or portion of any document covered by this request is withheld from production you must identify each such document or portion of the document, and provide, with respect to each such document or portion thereof, (a) the reason(s) for withholding, (b) the date of the document, (c) the identity of each person who drafted or assisted in the preparation of the document, (d) the identify of each person who received or had access to the document or copies thereof, or to whom any portion of the contents has been communicated, (e) the type of document and a brief description of the nature and subject matter of the document, and (f) a statement of the facts that

constitute the basis for the claim of privilege.

4. If production of any requested document is objected to on the grounds that production is unduly burdensome, describe the burden or expense of the proposed discovery.

5. Documents should be produced as they are kept in the ordinary course of business. Where possible, organize and label each document or set of documents, indicating by number the request to which the document(s) relates.

6. If any document responding to all or any part of the request for documents is not currently available, include a statement to that effect and furnish whatever documents are available. Include in your statement when such documents were most recently in your possession or subject to your control and what disposition was made of them. Identify the name, job title, and the last known address of each person currently in possession or control of such documents. If any such documents were destroyed, identify the name, job title, and the last known business address of each person who directed that the documents be destroyed, and state the reasons the documents were destroyed.

**Documents to be Produced**

1. All documents related to your job responsibilities as a Canyon County public defender prior to the opening of the Canyon County Public Defender Office on October 1, 2014.

2. All documents related to your job responsibilities as a Canyon County public defender after the opening of the Canyon County Public Defender Office on October 1, 2014.

3. All documents related to your workload as a Canyon County public defender.

4. All documents related to any training you received or requested in your role as a Canyon County public defender.

5. All documents related to communications between you and Canyon County Chief Public Defender Tera Harden, or other management officials within the Canyon County Public Defender Office, regarding your ability or capacity to represent the indigent defendants to whom you were assigned as a Canyon County public defender.

6. All documents related to communications between you and any Canyon County judges or other court personnel, regarding your ability or capacity to represent the indigent defendants to whom you were assigned as a Canyon County public defender.

7. All documents related to communications between you and any Canyon County prosecutors, regarding your ability or capacity to represent the indigent defendants to whom you were assigned as a Canyon County public defender.

8. All documents related to any formal or informal supervision you received as a Canyon County public defender.

9. All documents related to any formal or informal evaluations you received as a Canyon County public defender.

10. All documents related to your use of investigators in your role as a Canyon County public defender.

11. All documents related to your use of expert analysis or testimony in your role as a Canyon County public defender.

12. All documents related to any informal or formal complaints you have received or of which you are aware, regarding your representation of indigent defendants in your role as a Canyon County public defender.

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

RESPONSE TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING DECISION ON MOTION TO DISMISS – 1



TG

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING DECISION ON MOTION TO DISMISS**

Plaintiffs, a proposed class of all indigent persons who are now, or will be in the future, under formal charge before a state court in Idaho of having committed any offense that could result in imprisonment, and who are unable to pay for an attorney, hereby oppose Defendants' Motion for Protective Order Staying Discovery Pending Decision on Motion to Dismiss. Defendants' motion to dismiss raises questions of fact regarding, among other things, whether and the extent to which certain state officials, including the Governor and members of the Idaho State Public Defense Commission, have been involved in the delivery or reform of indigent defense services in Idaho. Plaintiffs seek discovery on these exact issues. Defendants' motion for protective order should be denied for two additional reasons. First, the issues raised by this case are of great public interest. Second, proceeding with limited discovery – especially of third party witnesses – would impose no undue burden on Defendants. Defendants have therefore failed to meet the heavy burden required to justify a stay of discovery. Accordingly, Plaintiffs respectfully request that the Court deny Defendants' motion and allow discovery to continue on schedule.

## BACKGROUND

On June 17, 2015, Plaintiffs filed a complaint against the State of Idaho, the Governor of Idaho, and the members of the Idaho State Public Defense Commission seeking declaratory and injunctive relief from Defendants' ongoing failure to ensure that indigent defendants in Idaho state courts receive the legal representation guaranteed to them under the U.S. and Idaho Constitutions. The Complaint alleges that the failures within Idaho's indigent defense delivery system (which include, but are not limited to, a lack of sufficient funding, oversight, and

training) are pervasive and consistent across counties throughout the state. Plaintiffs further allege that Defendants are constitutionally required to ensure that adequate indigent defense services are provided to Idaho's poorest citizens; that the Governor bears ultimate responsibility for the provision of indigent defense services to Idaho residents; and that the members of Idaho's Public Defense Commission are responsible for promulgating rules related to training and data-reporting requirements for defense attorneys across the state and for recommending core requirements to the legislature to ensure that Idaho's indigent defense delivery system meets constitutional muster, in addition to recommendations related to enforcement mechanisms and various funding issues. Compl. ¶¶ 85-87.

On July 8, 2015, Defendants filed a motion to dismiss under Idaho Rule of Civil Procedure 12(b), in which they "acknowledge the seriousness of the issues that Plaintiffs describe in their Complaint," but argue that the named Defendants (the State of Idaho, the Governor of Idaho, and the members of the Idaho State Public Defense Commission) have no power to grant the requested relief. *See* Mem. Supp. Mot. Dismiss at 6. The motion argues that neither the State of Idaho, its Governor, nor its Public Defense Commission, as a matter of state and federal statutory law, have any connection with the delivery of public defense in this state and have no authority to do anything about it. *See id.* at 9–10.

On August 21, 2015, Defendants filed a Motion For Protective Order Staying Discovery Pending Decision On Motion To Dismiss. In this motion, Defendants seek to stay all discovery on the grounds that the motion to dismiss raises purely legal arguments about whether this Court can grant any relief against these Defendants, and that "permitting discovery before the Court rules on the motion to dismiss would impose unnecessary and undue burdens on Defendants." Mem. Supp. Mot. at 4. For the reasons described herein, both arguments fail.

## ARGUMENT

Defendants' request to stay discovery should be denied because discovery would help this Court decide the central legal question raised by Defendants' motion to dismiss, namely: who exercises what authority (and when, how, and to what extent) over the provision of indigent defense services in Idaho. Defendants will face no undue prejudice if they are made to respond to Plaintiffs' discovery requests, and they have failed to supply any compelling reason why discovery should be stayed. Indeed, Plaintiffs thus far have acted reasonably in seeking discovery, even voluntarily narrowing their discovery requests to those that are most relevant to deciding the motion to dismiss, i.e. those requests that seek discovery regarding the extent to which certain state officials, including the Governor and members of the Idaho State Public Defense Commission, have been involved in the delivery or reform of public defense services in Idaho. *See* 2d Eppink Affidavit. The balance tips further in favor of allowing discovery to proceed in light of the fact that, as Defendants themselves have acknowledged, this case raises issues of great public importance.

### A. Legal Standard

The Idaho Supreme Court has emphasized that stays of discovery are disfavored, and that discovery should not be stayed on account of a pending motion unless the motion would dispose of the entire action. *Taylor v. AIA Servs. Corp.*, 261 P.3d 829, 847 (Idaho 2011) (citation omitted). This is consistent with the approach taken by numerous other courts, which, as a matter of general course, refuse to stay discovery absent good cause to do so. *See, e.g.*, *Young v. United States*, 907 F.2d 156 (9th Cir. 1990) (applying the federal rule and noting that stays of discovery should not be granted absent a showing of "good cause"); *IPVX Patent Holdings, Inc. v. 8X8, Inc.*, No. C 13-01707 SBA, 2013 WL 6000590, at *2 (N.D. Cal. Nov. 12, 2013)

(declining to stay discovery pending resolution of motion to dismiss where defendant failed to carry burden to demonstrate good cause); *Spreadbury v. Bitterroot Pub. Library*, No. CV 11-64-M-DWM-JCL, 2011 WL 2117563, at *3 (D. Mont. May 25, 2011) (denying motion to stay discovery pending motion for partial summary judgment).

A pending motion to dismiss may justify a stay of discovery only where there are no factual issues raised by the pending motion, discovery is not required to address the issues raised by the motion, and the court is convinced that the plaintiff is unable to state a claim for relief. *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *White v. Am. Tobacco Co.*, 125 F.R.D. 508 (D. Nev. 1989) (citing *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981)). Put another way, stays of discovery are "disfavored unless there are no factual issues in need of further immediate exploration, and the issues before the Court are purely questions of law that are potentially dispositive . . . such as where a challenge is directed to the Court's jurisdiction." *FLSmidth Spokane, Inc. v. Emerson*, No. 1:13-CV-00490-EJL, 2014 WL 979187, at *1-2 (D. Idaho Mar. 12, 2014) (citation and internal quotation marks omitted); *Cf. TradeBay, LLC v. Ebay, Inc.*, 278 F.R.D. 597, 600 (D. Nev. 2011) (typical situations in which staying discovery pending a ruling on a dispositive motion are appropriate where the dispositive motion raises issues of jurisdiction, venue, or immunity).

A party seeking a discovery stay bears a "heavy burden" and must make a "strong showing" in favor of a discovery stay. *Raymond v. Sloan*, No. CIV. 1:13-423, 2014 WL 4215378, at *7 (D. Idaho Aug. 25, 2014) (citing *Skellerup Indus. Ltd. v. City of Los Angeles,* 163 F.R.D. 598, 600 (C.D. Cal. 1995)) (citations and internal quotation marks omitted). A party moving for a protective order to stay discovery must show a particular and specific need for the protective order, as opposed to making stereotyped or conclusory statements. *Timothy v. Oneida*

*Cnty.*, No. 4:14-CV-00362-BLW, 2015 WL 4170140, at *2 (D. Idaho July 9, 2015) (citations omitted). Under this standard, a court "may stay discovery only if it is *convinced* that the plaintiff cannot state a claim for relief." *U.S. ex rel. Jacobs v. CDS, P.A.*, No. 4:14-cv-301, 2015 WL 5257132, at *2 (D. Idaho Sept. 3, 2015) (internal citation omitted) (emphasis in original).

Notably, a stay is not permissible to merely save the time and expense that is part of discovery in all types of litigation. *Raymond*, 2014 WL 4215378, at *7. Further, discovery stays are disfavored by courts because they undermine judicial efficiency. *See, e.g., Raymond*, 2014 WL 4215378, at *7. The Idaho Rules of Civil Procedure, which substantially match the applicable federal rules, encourage the speedy resolution of litigation and liberal discovery. *See, e.g., Skellerup,* 163 F.R.D. at 600–01; *Gray v. First Winthrop Corp.,* 133 F.R.D. 39, 40 (N.D. Cal. 1990). These rules do not provide any special procedures for discovery stays when a motion to dismiss is filed. *See Timothy*, 2015 WL 4170140, at *2 (discussing the federal rules).

**B. Defendants Have Failed To Meet Their Heavy Burden To Demonstrate That A Stay Of Discovery Is Warranted**

As noted above, stays of discovery are disfavored and are appropriate only in rare instances when a motion to dismiss raises no factual questions to which discovery would be relevant. That is far from the case here. To the contrary, Defendants' motion to dismiss raises substantial factual questions that cannot be resolved without at least some limited discovery. Moreover, Defendants' generalized, conclusory assertions regarding the burdens of responding to Plaintiffs' discovery requests – which, as noted above, Plaintiffs have made good faith efforts to narrow – fail to make the necessary "strong showing" to justify a stay of discovery, especially in light of the strong public interest in efficiently resolving this case. Further, even if Defendants were to prevail on their motion to dismiss, Plaintiffs would simply file suit against other state or local defendants, thereby requiring the State to respond to the very same discovery requests in

any event, whether pursuant to IRCP 45 or 34. Defendants' motion should be denied.

**1. Defendants' motion to dismiss raises issues that could be more effectively resolved after discovery on threshold factual issues.**

Defendants' motion to dismiss raises not only questions of law, but questions of fact as to who has exercised authority over the delivery of indigent defense services in Idaho, and to what extent. Discovery therefore will be relevant to show, among other things, what the Defendants have failed to do in discharging their existing responsibilities over indigent defense, as well as what they have done and could do to improve the system.

Plaintiffs' discovery requests demonstrate how discovery would be relevant to the issues raised in the motion to dismiss. For example, Plaintiffs have propounded interrogatories requesting that Defendants identify the state officials with the authority to ensure that indigent defendants are receiving the representation guaranteed under the federal and state constitution, all efforts undertaken by Defendants to address the oversight of indigent defense in the State, and any funding proposals by the Governor's office to contribute funding to the provision of trial-level indigent defense services. Plaintiffs have also requested all documents regarding any alternate legislation or reforms considered by the State of Idaho relating to the provision of indigent defense services since 2010; documents related to any actual or proposed funding of indigent defense services by the State of Idaho since 2010 (including documents relating to how indigent defense services are funded by each of the 44 counties); documents relating to oversight provided to trial-level counsel; and recommendations and rules proposed by the Idaho State Public Defense Commission. All of these questions, among others included in Plaintiffs' discovery requests and to be included in future discovery, are questions of fact that are relevant to Defendants' motion to dismiss.

In addition, Defendants argue that neither the Governor nor the Commissioners fall

within the ambit of *Ex Parte Young*, in which the U.S. Supreme Court established an exception to the general rule that, under the Eleventh Amendment, states cannot be sued by non-state actors, and allowed such actors to sue states for prospective relief, where the suit personally named a state official. Specifically, the Court found that "[i]n making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Ex Parte Young*, 209 U.S. 123, 157 (1908). While the Court's language makes clear that not *every* state official may be sued under the *Ex Parte Young* doctrine, those that have "some connection" to the enforcement of the challenged act certainly can be. Although Defendants appear to argue that there is *no state official* who is responsible for ensuring the delivery of indigent defense services to poor Idahoans, such an excuse is insufficient. *See HRPT Properties Trust v. Lingle*, 715 F. Supp. 2d 1115, 1127 (D. Haw. 2010) ("If there is no state official charged with enforcing Act 189, then it stands to reason that Governor Lingle herself is the person with the power to instruct state officials in the executive branch to enforce or to refrain from enforcing Act 189."). As such, there are questions of fact that bear on whether the state official named as defendants have a "some connection" to the delivery of public defense in Idaho.

**2. Defendants have failed to offer any compelling reason why discovery should be stayed.**

Defendants' conclusory arguments that their motion to dismiss will succeed are insufficient to meet the required "strong showing" to warrant a stay of discovery. Plaintiffs have sued the State, its top executive official, and members of a public defense commission that was created specifically to protect the constitutional rights of indigent defendants in Idaho.

As an initial matter, Defendants' motion to dismiss is not likely to succeed. First, contrary to their assertions, Defendants do have authority to effect change on the State's indigent defense services, which is supported by the language codified in the state's public defense statutes, and will be, we believe, supported by discovery. Second, the Idaho Supreme Court has made clear that the counties of the State of Idaho are merely arms of the State. *See, e.g., State ex el. Rich v. Larson*, 84 Idaho 529, 374 P.2d 484 (1962); *Peterson v. Bannock County*, 61 Idaho 419, 102 P.2d 647 (1940); *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134 (1939). The U.S. Supreme Court has been equally clear that the provision of indigent defense services is a responsibility of the State. *See, e.g.,* Argersinger v. Hamlin, 407 U.S. 25 (1972) (acknowledging "the burden that the States will have to bear in providing counsel" as a result of the *Gideon v. Wainwright* line of cases; Scott v. Illinois, 440 U.S. 367 (1979) (holding that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless *the State* has afforded him the right to assistance of appointed counsel in his defense.") (emphasis added); M.L.B. v. S.L.J., 519 U.S. 102 (1996) (noting that, under *Gideon*, a State must provide trial counsel for an indigent defendant charged with a felony). As such, Defendants cannot avoid this legal obligation by merely asserting that the State has delegated its authority to the counties.

Likewise, Defendants' arguments regarding the time and expense of discovery apply to all litigation, and are belied by the fundamental goal of the Rules of Civil Procedure to promote speedy resolution of litigation. The flawed premise underlying Defendants' argument is that because they have moved to dismiss, the Court should stay discovery. That is, however, insufficient. A defendant's confidence that it will prevail on a dispositive motion does not, by itself, justify staying discovery. *See Gray v. First Winthrop Corp.,* 133 F.R.D. 39, 40 (N.D. Cal.

1990). In fact, a federal district court in Idaho recently addressed this issue directly, noting that the defendants' belief that they would prevail on their motion to dismiss was insufficient. *Timothy*, 2015 WL 4170140, at *2 ("This idle speculation does not [warrant staying discovery] . . . Such general arguments could be said to apply to any reasonably large civil litigation . . . Had the Federal Rules contemplated that a motion to dismiss . . . would stay discovery, the Rules would contain a provision for that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation.") (alterations and internal citation omitted).* The fact that a "non-frivolous motion [to dismiss] is pending is simply not enough to warrant a blanket stay of all discovery." *U.S. ex rel. Jacobs*, 2015 WL 5257132, at *1 (internal citation omitted).

**3. The balance of equities and the public interest weigh in favor of permitting discovery to proceed.**

This Court should decline to stay discovery for at least two more reasons. First, the Court should consider the strong public interest in an open, efficient resolution of this matter. That interest weighs in favor of permitting discovery to go forward here, where a large, geographically diverse class of Idaho residents seeks injunctive relief for civil rights violations that are a result of decisions made by Idaho public officials and entities. The case has attracted substantial media attention across Idaho and the United States, and the public has a deep and strong interest in the prompt resolution of Plaintiffs' claims. *See Morrow v. City of Tenaha Deputy City Marshal Barry Washington*, No. 2-08-CV-288-TJW, 2010 WL 3057255, at *5 (E.D. Tex. July 30, 2010) ("The Court notes that this case has garnered considerable public attention as

* There are no special rules that require a stay of discovery in civil rights lawsuits such as this one when a motion to dismiss has been filed. *Compare to Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 966-67 (9th Cir. 2014) (applying the Stay of Discovery provision in a federal securities act, which provision shows Congress's clear intent to postpone discovery in *federal securities class actions* until the sufficiency of a complaint has been sustained).

a result of the serious allegations made against local public officials. Because of this and the fact that this case is a class action involving constitutional rights and alleging abuses by public officials, the prompt resolution of this case would best serve the public interest."). Defendants should not be allowed to delay all discovery on these important issues by merely asserting that Plaintiffs, in seeking relief from the State, its top public official, and a public commission on indigent defense, have sued the wrong public officials.

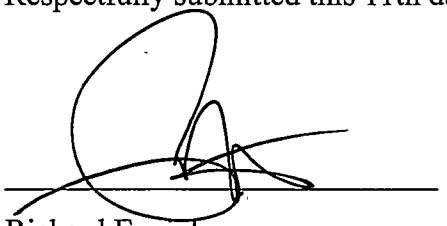
Second, the fact that Defendants would face minimal or no burden if they are made to comply with Plaintiffs' discovery requests weighs strongly in favor of permitting discovery to proceed. *See, e.g., Kanowitz v. Broadridge Fin. Solutions, Inc.*, No. CV 13-649 DRH AKT, 2014 WL 1338370, at *10 (E.D.N.Y. Mar. 31, 2014). Because Plaintiffs seek injunctive relief from the State and State officials, there is little danger of an innocent party being forced to settle a frivolous class action to avoid incidental discovery costs. *Cf. Gardner v. Major Auto. Cos.*, 11 Civ. 1664, 2012 WL 1230135, at *3 (E.D.N.Y. Apr.12, 2012) (part of the reason behind discovery stays is to avoid saddling defendants with the burden of discovery in meritless or frivolous cases and to discourage the filing of such cases). At bottom, Defendants have not established that allowing discovery will cause them any prejudice or harm. That conclusion is underscored by the fact that Plaintiffs have acted reasonably in their quest for discovery, and have even narrowed their discovery requests to those most relevant to the motion to dismiss. *See* 2d Eppink Affidavit. Although all discovery necessarily involves some inconvenience and expense, this is not a sufficient reason for a stay or protective order. Moreover, this Court retains ample power to control discovery so as to minimize incidental costs going forward as it sees fit. *See, e.g.*, IRCP 26(b)(2).

## CONCLUSION

Idaho case law, which is consistent with the approach taken by federal courts, makes clear that blanket stays of discovery pending resolution of a motion to dismiss are disfavored unless the pending motion raises purely legal questions. Defendants' motion to dismiss raises important factual questions regarding the extent to which Defendants have more than "some connection" to Idaho's public defense system, *see Ex Parte Young*, 209 U.S. at 157.

For these reasons and the others set forth above, Plaintiffs respectfully request that the Court deny Defendant's Motion For Protective Order Staying Discovery Pending Decision On Motion To Dismiss and allow discovery to continue in this matter without limitation.

Respectfully submitted this 11th day of September, 2015.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of September, 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to each of the following:

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# APPENDIX

2014 WL 979187
Only the Westlaw citation is currently available.
United States District Court,
D. Idaho.

FLSMIDTH SPOKANE, INC., Plaintiff,
v.
Andrew EMERSON, et al., Defendants.

No. 1:13–cv–00490–EJL–CWD. | Signed March 12, 2014.

**MEMORANDUM DECISION AND ORDER AMENDING DOCKET NO. 30**

CANDY W. DALE, United States Magistrate Judge.

*1 This Order amends and supersedes the Court's Docket Entry Order entered on March 10, 2014 (Dkt.30).

This matter is before the Court on Defendants' Motion for Protective Order, (Dkt.23), which requests a stay of all discovery pending a decision on Defendants' Motion to Dismiss (Dkt.6).[1] The current deadline for completion of all discovery in this case is September 1, 2014, and a bench trial before District Judge Edward Lodge is set for May 19, 2015. (Dkt.21.) Pursuant to Judge Lodge's referral of all non-dispositive matters in this case, (Dkt.10), the Court has held two telephonic status conferences with the parties in an effort to address their impasse over the requested protective order.

1 Consistent with District of Idaho Local Civil Rule 37.1, the parties met and conferred on Defendants' proposed protective order but were unable to reach agreement.

The first of these conferences occurred on February 25, 2014. (Dkt.28.) At that time, the Court directed the parties to meet and confer on Defendants' objections to discovery, including Defendants' specific objections to the individual requests in Plaintiff's first set of written discovery. The intent of this directive was for the parties to identify discovery that could go forward either before or immediately after a decision is rendered on the motion to dismiss. On March 7, 2014, Plaintiff filed a notice, stating that the parties conferred and "resolved all objections by Defendants to Plaintiff's First Set of Interrogatories and Requests for Production of Documents [p]ropounded to Defendants."(Dkt. 29 at 1–2.) Interpreting this statement as a resolution of all of Defendants' objections to discovery, on March 10, 2014, the Court entered a docket entry order finding Defendants' motion for protective order moot. (Dkt.30.)

Following entry of the March 10 Order, counsel for Defendant contacted Chambers[2] and stated that, despite Plaintiff's notice stating otherwise, Defendants were continuing to ask for a protective order from any and all discovery being conducted until the motion to dismiss is decided. Therefore, on March 12, 2014, the Court held a second telephonic status conference to address Defendants' concerns about the March 10 docket entry order (Dkt.30). Based on the comments of counsel during the status conference, it is now clear that Defendants do not have specific, unresolved objections to the written discovery served by Plaintiff. However, Defendants object to going forward with certain depositions Plaintiff attempted to schedule after the parties' March 7 meet and confer. And, as stated in the motion for protective order, Defendants maintain their overarching objection to any discovery in this case while the motion to dismiss is pending. Accordingly, the Court finds Defendants' motion for protective order, (Dkt.23), is not moot and, for reasons stated below, will grant the motion in part and deny it in part.

2 Counsel spoke to the undersigned's law clerk, Mark Cecchini–Beaver.

**1. Legal Standard**

Rule 26(c) permits the Court, "for good cause, [to] issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."The United States Supreme Court has recognized this language confers "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required."*Seattle Times Co. Rhinehart,* 467 U.S. 20, 36, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Although a court may, for good cause shown, stay discovery pending resolution of a motion to dismiss, e.g., *Stock v. Comm'r of the I.R.S.,* No. CV–00–467–E–BLW, 2000 WL 33138102 (D.Idaho Dec. 20, 2000), that result is not automatic. E.g., *Twin City Fire Ins. Co. v. Employers Ins. of Wausau,* 124 F.R.D. 652 (D.Nev.1989). Indeed, a complete stay of discovery is disfavored unless "there are no factual issues in need of further immediate exploration, and the issues before the Court are purely questions of law that are potentially dispositive ... such as where a challenge is directed to the Court's jurisdiction."*Hachette Dist., Inc. v. Hudson County News Co.,* 136 F.R.D. 356, 358 (E.D.N.Y.1991). The good

cause inquiry is necessarily dependent on the facts and posture of each case. *Id.*

**2. Discussion**

*2 Defendants argue that there is good cause for a protective order staying all discovery because such an order will protect both parties from undue burden and unnecessary expense. Defendants note that the motion to dismiss attacks the sufficiency of the Complaint and, if granted or even granted in part, could obviate or narrow the discovery in this case. Plaintiff opposes Defendants' motion, arguing it is merely an effort to prejudice Plaintiff and delay expeditious resolution of this case.

As a preliminary matter, the Court agrees with Defendants' characterization of the motion to dismiss. The motion attacks the sufficiency of the Complaint and does not raise any jurisdictional issue that could potentially result in dismissal as a matter of law. It is therefore unclear whether a decision granting the motion to dismiss would necessarily moot discovery. On the other hand, if the motion is denied, delayed discovery could affect other case management deadlines, eviscerating the Court's Scheduling Order (Dkt .21).

The *Stock* case is instructive because it highlights particular circumstances that warrant a stay of all discovery. There, the discovery requests were voluminous, covering approximately 200 pages. *Stock,* 2000 WL 33138102, *2. The requests also were "burdensome[,] broad," and did not comply with the limit on interrogatories set by the applicable local rule. *Id.* Moreover, the court expressed concern that the case might be "sidetracked" by discovery disputes before two motions to dismiss could be resolved. *Id.* Accordingly, the *Stock* court stayed discovery.

This case is not *Stock.*Here, Plaintiff has so far propounded interrogatories and requests for production numbering 13 pages-inclusive of caption, instructions, definitions, verification, and service details. (Dkt.23–2.) In accordance with the Court's February 25 directive, the parties conferred, and "resolved all objections" to these requests. (Dkt.29.) Both parties now agree there are no specific objections to any discovery thus far propounded. Thus, there is no apparent risk that this case will be sidetracked by additional discovery disputes regarding the pending discovery requests before the motion to dismiss is resolved.

Defendants nevertheless maintain their general objection to discovery solely because their motion to dismiss is pending. Although a stay may avoid undue discovery expenses at this early stage in the litigation, it may also delay the speedy resolution of this case. *See*Fed.R.Civ.P. 1. Given these circumstances, Defendants have not shown good cause for a complete stay of discovery. The Court is, however, concerned that Plaintiff's proposed depositions or additional written discovery may be premature at this juncture. Therefore, the Court finds good cause for a more limited stay of discovery.

**ORDER**

Based on the foregoing, the Court being fully advised in the premises, IT IS HEREBY ORDERED that Defendants' Motion for Protective Order (Dkt.23) is GRANTED IN PART AND DENIED IN PART.

*3 Defendants shall respond to Plaintiff's first set of written discovery requests within 30 days of the date of this order. Plaintiff is restrained from serving any additional discovery requests or noticing any depositions unless Defendants agree to such discovery or until the Court resolves the pending motion to dismiss, whichever is sooner.

**All Citations**

Not Reported in F.Supp.2d, 2014 WL 979187

**End of Document**

2012 WL 1230135
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Dorsey R. GARDNER, et al., Plaintiffs,
v.
The MAJOR AUTOMOTIVE COMPANIES and Bruce Bendell, Defendant.

No. 11–CV–1664 (FB). | April 12, 2012.

**Attorneys and Law Firms**

Marc A. Lebowitz, Lebowtiz Law Office, LLC, New York, NY, Mark B. Rosen, Portsmouth, NH, for Plaintiffs.

Robert F. Brodegaard, Brodegaard & Associates LLC, New York, NY, for Defendant.

***MEMORANDUM AND ORDER***

ROANNE L. MANN, United States Magistrate Judge.

***1** Plaintiffs Dorsey R. Gardner and John Francis O'Brien, trustees of the Dorsey R. Gardner 2002 Trust (collectively, "plaintiffs"), move for an order compelling The Major Automotive Companies, Inc. ("Major") and a member of its Board of Directors, Bruce Bendell ("Bendell") (collectively, "defendants"), to produce documents and respond to interrogatories served by plaintiffs in their initial discovery requests. *See* Pl. Mot. to Compel Disc. (Nov. 1, 2011) ("11/1/11 Pl. Mot. to Compel"), Electronic Case Filing ("ECF") Docket Entry ("DE") # 19. Defendants cross-move to stay discovery pending resolution of their motion, served by them on November 14, 2011, seeking judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure or dismissal of the complaint pursuant to Rule 12(b)(6) of the same. *See* Def. Mot. to Stay Disc. (Nov. 14, 2011), DE # 27; Def. Mem. in Supp. of Mot. to Stay (Nov. 14, 2011), DE # 27–1 ("11/14/11 Def. Mot. to Stay"); *see also* Def. Mem. in Supp. of Mot. for Judgment on the Pleadings (Nov. 14, 2011) ("11/14/11 Def. Mem."), DE # 34–8. [1] Because the discovery motions essentially represent two sides of the same argument, and require the same threshold analysis, the Court analyzes them together.

[1] The case was reassigned to this magistrate judge after the parties filed their discovery cross-motions.

For the reasons to follow, the Court grants defendants' motion to stay discovery during the pendency of their dispositive motion, and denies plaintiffs' motion to compel defendants to respond to plaintiffs' initial discovery requests.

***BACKGROUND***

The instant case arises out of an allegedly improper management buyout transaction of Major, a publicly traded company, effectuated by defendants. *See* Compl. (Apr. 5, 2011) ¶ 1, DE # 1. The Complaint charges Major and Bendell, who is described as Major's "principal officer and majority shareholder," with "violations of Section 14(a) of the Securities Exchange Act of 1934 (the 'Exchange Act') and Securities and Exchange Commission ('SEC') Rule 14a–9 promulgated thereunder and [with] breaches of fiduciary duty." *Id.* In brief, plaintiffs allege that defendants (1) offered a misleading justification for the buyout transaction, which was designed to benefit Bendell at the expense of its minority public shareholders; (2) failed to create a special committee of disinterested or independent members to evaluate the fairness of the transaction for the benefit of minority shareholders; (3) failed to consider alternatives to the transaction; (4) withheld and failed to consider financial information from the eighteen months preceding the transaction (resulting in an artificially depressed valuation of the company); and (5) omitted from their proxy material information regarding Major's performance and true value, so as to mislead minority shareholders. *See id.* ¶¶ 5–6, 16–35.

According to plaintiffs, defendant Bendell (along with other, unnamed Board members) thereby breached his fiduciary duties of care, loyalty, and good faith and fair dealing, and negligently misrepresented the fair price of Major's stock, all in violation of Nevada state law. *See* Compl. ¶¶ 36–42, 52–58. In addition, plaintiffs complain that the material omissions in defendants' proxy materials violated federal securities laws, specifically, Section 14(c) of the Exchange Act and Rule 14a–9 promulgated thereunder. *See id.* ¶¶ 43–51; 15 U.S.C. § 78n(a); 17 C.F.R. 240.14a–9(a). In their Answer, defendants deny the allegations and assert a number of affirmative defenses. *See* Answer (May 25, 2011), DE # 5.

***2** The parties have already taken a number of steps in the discovery process in this case. The parties exchanged initial disclosures on July 14, 2011. *See* Defendants' Rule

26(a) Initial Disclosure Statement (July 14, 2011), DE # 8; Plaintiffs' Rule 26(a) Initial Disclosure Statement (July 14, 2011), DE # 9. Plaintiffs then served defendants with their document requests on August 2, 2011 and first set of interrogatories on August 3, 2011. *See* Decl. of Robert F. Brodegaard (Nov. 14, 2011) ("Brodegaard Decl.") ¶ 3, Exh. A to 11/14/11 Def. Mem., DE # 27–2. Over the next several days, plaintiffs issued subpoenas to a series of non-parties,[2] pursuant to Rule 45(c) of the Federal Rules of Civil Procedure. *See* Brodegaard Decl. ¶ 4–5. On August 30, 2011, the parties agreed that defendants would respond to plaintiffs' initial discovery requests by September 16th, *see* Email from L. Varn to R. Brodegaard (Aug. 30, 2012), Exh. C to Decl. of Mark B. Rosen in Supp. of Mot. to Compel (Nov. 1, 2011), DE # 20–3, and they filed a stipulation as to electronic discovery on September 19, 2011. *See* Stipulation Regarding Electronically Stored Information (Sept. 19, 2011), DE # 13. Defendants did not respond to plaintiffs' discovery requests, but instead, in a letter docketed on September 21, 2011, requested a premotion conference regarding defendants' proposed motion for "judgment on the pleadings, dismissing the case in its entirety and, pending the Court's resolution of the motion, a stay of discovery."Def. Mot. for Pre–Mot. Conference (Sept. 21, 2011), DE # 14; *see also* 11/14/11 Def. Mot. to Stay at 2 (citing Brodegaard Decl. ¶¶ 9–10); 11/1/11 Pl. Mot. to Compel at 1.

2 Including Empire Valuation Consultants, LLC, the entity that drafted defendants' fairness report; Major's in-house counsel, Gordon Silver; HSBC Bank U.S.A., N.A.; and Wells Fargo Bank, N.A.

On November 14, 2011, following a premotion conference held on October 25, 2011, defendants served their motion for judgment on the pleadings pursuant to Rule 12(c) or, in the alternative, for dismissal for failure to state a claim under Rule 12(b)(6).*See* Notice of Def. Mot. for Judgment on the Pleadings or to Dismiss Compl. in its Entirety (Dec. 23, 2011) ("12/23/11 Notice"), DE # 34; 11/14/11 Def. Mem., D.E. # 34–8; Pl. Opp'n to Def. Mot. for Judgment on the Pleadings (Dec. 9, 2011), DE # 34–9; Def. Reply Mem. in Supp. of Mot. for Judgment on the Pleadings or to Dismiss Compl. in its Entirety (Dec. 23, 2011), DE # 34–10. The parties' fully submitted papers were filed on December 23, 2011. *See* 12/23/11 Notice. Defendants' dispositive motion is currently pending before the Honorable Frederic Block, the District Judge assigned to this case.

## *DISCUSSION*

The parties' discovery-related cross-motions raise two distinct issues. First, the Court must determine whether the automatic stay provision of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u–4(b)(3)(B), mandates a stay of discovery pending the resolution of defendants' dispositive motion. Specifically, the parties dispute whether the PSLRA applies to post-answer motions for judgment on the pleadings and, if so, whether the stay should apply to any or all of plaintiffs' claims. Second, if the Court concludes that the automatic stay provisions of the PSLRA do not apply, then it must determine whether a stay is appropriate under Rule 26(c) of the Federal Rules of Civil Procedure.

**3 Having concluded that the PSLRA automatic stay applies to each of plaintiffs' claims, the Court need not and does not reach the Rule 26(c) issue.

### I. Application of Stay to Defendants' Motion for Judgment on the Pleadings

Plaintiffs first argue that a stay is inappropriate because the automatic stay provision of the PSLRA applies only to pre-answer motions to dismiss and not to post-answer motions for judgment on the pleadings. *See* 11/1/11 Pl. Mot. to Compel at 1, 3. Defendants counter that the automatic stay provision is applicable here because a motion for judgment on the pleadings, "[i]n essence, ...*is* a motion to dismiss."*See* Def. Opp'n to 11/1/11 Pl. Mot. to Compel (Dec. 9, 2011), at 4, DE # 29. This Court agrees with defendants.

The PSLRA was designed to deter frivolous securities litigation through stringent pleading requirements and an automatic stay of discovery pending the resolution of "any motion to dismiss." 15 U .S.C. § 78u–4(b)(3)(B). The PSLRA provides, in pertinent part, that:

> In any private action arising under this chapter [the Exchange Act, 15 U.S.C. §§ 78a *et seq.*], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

*Id.*

Contary to the premise of plaintiffs' argument, the plain language of the PSLRA does not limit the scope of the automatic stay requirement to any particular species of motion to dismiss, and courts have broadly construed the scope of the stay provision. First, the automatic stay provision has been held to apply to both initial and successive motions to dismiss. *See Sedona v.Ladenburg Thalmann,* No. 03 Civ. 3120 LTSTHK, 2005 WL 2647945, at *3 (S.D.N.Y. Oct.14, 2005); *In re Salmon Analyst Litig.,* 373 F.Supp.2d 252, 256 (S.D.N.Y.2005). In fact, as noted by (now) Circuit Judge Gerard A. Lynch, "it is appropriate to extend the stay"'until a complaint has been authoritatively sustained by the court ....' *Id.; see Podany v. Robertson Stephens, Inc.,* 350 F.Supp.2d 375, 378 (S.D.N.Y.2004) (Lynch, J.) (noting that, in PSLRA cases, there is a "strong presumption that *no* discovery should take place until a court has affirmatively decided that a complaint *does* state a claim under the securities laws, by denying a motion to dismiss") (emphasis in original). Staying discovery pending judicial evaluation of the sufficiency of the complaint is consistent with "the entire purpose of the stay provision[, which] is to avoid saddling defendants with the burden of discovery in meritless cases, and to discourage the filing of cases that lack adequate support for their allegations in the mere hope that the traditionally broad discovery proceedings will produce facts that could be used to state a valid claim." *Podany,* 350 F.Supp.2d at 378. Consequently, those motions that require a court to determine the facial sufficiency of the pleadings fall within the ambit of the PSLRA's automatic stay provision, regardless of whether the complaint has been answered.

*4 Here, defendants have filed a motion for judgment on the pleadings pursuant to Rule 12(c)*or* to dismiss the Complaint in its entirety under Rule 12(b)(6) for failure to state a claim. *See generally* 11/14/11 Def. Mem., DE # 34–8. Rule 12(c) provides that "[a]fter the pleadings are closed —but early enough not to delay trial—a party may move for judgment on the pleadings."Fed.R.Civ.P. 12(c). The Second Circuit has held that courts faced with Rule 12(c) motions for judgment on the pleadings must "employ [ ] the same standard applicable to dismissals pursuant to Fed.R.Civ.P. 12(b)(6)."*Hayden v. Paterson,* 594 F.3d 150, 160 (2d Cir.2010) (citing *Johnson v. Rowley,* 569 F.3d 40, 43 (2d Cir.2009) (per curiam)). Indeed, Rule 12(d) of the Federal Rules of Civil Procedure treats Rules 12(b)(6) and 12(c) identically in addressing the ramifications of considering "matters outside the pleadings" and the conversion of motions to dismiss into motions for summary judgment. *See*Fed.R.Civ.P. 12(d). Significantly, whether filed under Rule 12(b)(6) or Rule 12(c), a motion to dismiss asks the court to decide whether the complaint should be "authoritatively sustained"[3] based solely on the available pleadings, drawing inferences in the light most favorable to the non-moving party. *See generally Hayden,* 594 F.3d at 160. Accordingly, this Court agrees with defendants that a Rule 12(c) motion is a "motion to dismiss" within the meaning of the PSLRA automatic stay provision, and that therefore the stay is triggered by defendants' Rule 12(c) motion.

3 *In re Salomon,* 373 F.Supp.2d at 256.

**II. Application of the Automatic Stay to Plaintiffs' Claims**

Having determined that the PSLRA automatic stay applies to defendants' dispositive motion, the next question is whether the stay should extend to all of plaintiffs' claims. As outlined above, plaintiffs advance three claims in their complaint: (1) a federal securities claim pursuant to Section 14(a) of the Exchange Act and Rule 14a–9 promulgated thereunder; (2) a Nevada state law claim for breach of fiduciary duties; and (3) a Nevada state law claim for negligent misrepresentation. *See* Compl. ¶¶ 36–51. Plaintiffs argue that the present case is "not a securities fraud action" as defined by the PSLRA, but rather is an action involving non-fraud state law claims and a Rule 14a–9 claim "based on negligent acts, not allegations of fraud."*See* Pl. Opp'n to Def. 11/14/11 Mot. to Stay (Dec. 9, 2011), at 2, DE # 30. Defendants counter that plaintiffs' Rule 14a–9 claim and breach of fiduciary duties claim are couched in terms of fraud or intentional misconduct, thereby falling within the scope of the automatic stay provision. *See* Def. Reply in Supp. of Mot. to Stay Disc. (Dec. 23, 2011), at 3, DE # 35.

As detailed below, because the plain language of the PSLRA does not distinguish between fraud-based and non-fraud-based claims, the discovery stay in this case should cover all claims.

First, the PSLRA stay provision expressly applies to federal securities *actions* (not claims) arising under the Exchange Act. *See*15 U.S.C. § 78u–4(b)(3)(B). Additionally, most courts in this Circuit have held that the automatic stay provisions of the PSLRA extend to state securities claims and non-securities claims brought in actions involving federal securities claims. *See In re Smith Barney Transfer Agent Litig.,* No. 05 Civ. 7583(WHP), 2006 WL 1738078, at *3

(S.D.N.Y. June 26, 2006) (holding that "[t]he PSLRA stay is not limited to discovery related to securities claims," but "applies to 'all discovery' in any 'action' under the PSLRA's purview, regardless of whether non-securities claims are alleged"); *Riggs v. Termeer,* No. 03 Civ. 4014 MP, 2003 WL 21345183, at *1 (S.D.N.Y. June 9, 2003) (holding that the automatic stay provisions of the PSLRA apply to related state law claims and to non-class-action securities claims where "the central claims asserted allege securities fraud and seek relief under the securities laws"); *In re Trump Hotel S'holder Deriv. Litig.,* No 96CIV.7820 (DAB)(HBP), 1997 WL 442135, at *1–2 (S.D.N.Y. Aug. 5, 1997) (holding that the automatic stay provision extends to derivative actions and to state law claims filed in conjunction with federal securities claims).

*5 To be sure, one case cited by plaintiffs has construed the statute to exclude breach of contract and tortious interference claims asserted pursuant to diversity jurisdiction. *See Tobias Holdings, Inc. v. Bank United Corp.,* 177 F.Supp.2d 162, 167–68 (S.D.N.Y.2001).[4] Rejecting the reasoning of the *Trump Hotel* case, 1997 WL 442135, at * 1–2, the court in *Tobias* found an ambiguity in the PSLRA because it is "not clear from the face of the statute whether Congress contemplated the situation where both federal question and diversity jurisdiction are invoked in a single action."*Tobias,* 177 F.Supp.2d at 165. Significantly, the *Tobias* court expressly noted that the claims for breach of contract and tortious interference (which the court referred to as "the non-fraud common law claims") "d[id] not mirror the federal securities claims ...." *Id.* at 168;*see id.* at 169.The court concluded that the PSLRA stay provision did not apply to those "distinct state law claims brought under diversity jurisdiction." *Id.* at 169.Notably, the plaintiff did not seek and the court did not order discovery on those claims that mirrored the federal securities claims—in *Tobias,* plaintiff's common law fraud claim. *See id.* at 164, 167.

4 In another decision issued out of the Southern District of New York, the court held that the PSLRA's automatic stay was inapplicable to a derivative action that did *not* assert a federal securities violation; the court nevertheless exercised its discretion to stay discovery pending its decision on a motion to dismiss. *In re Bancorp Deriv. Litig.,* 407 F.Supp.2d 585, 586–87 (S.D.N.Y.2006). In contrast to *Bancorp,* the instant case does involve a federal securities claim.

This Court concludes that both the text of the PSLRA and common sense support staying discovery with respect to each of plaintiffs' three claims. First, consistent with the language of the discovery stay provision, plaintiffs' federal securities claim clearly "arises under" the Exchange Act of 1934. Contrary to plaintiffs' assumption, the statutory text does not draw a distinction between federal securities claims that are based on fraud and federal securities claims that are based on negligence. As such, the discovery stay applies, at the very least, to the federal securities claim.

Moreover, the discovery stay also applies to plaintiffs' state law diversity claims. Where, as here, a private action arises under the federal securities laws, the PSLRA plainly calls for a stay of *"all* discovery and other proceedings," see 15 U.S.C. § 78u–4(b)(3)(B) (emphasis added), with no exception carved out for situations also involving non-fraud claims grounded in diversity jurisdiction.[5] Accordingly, this Court respectfully disagrees with the reasoning set forth in *Tobias* and, like the court in *Trump Hotel,* finds that the text of the PSLRA supports a stay of discovery as to each of plaintiffs' claims.

5 The PSLRA permits the Court to lift the automatic stay in the event it finds that "particularized discovery is necessary to preserve evidence or prevent undue prejudice to [a] party."15 U.S .C. § 78u–4(b)(3)(B). Plaintiffs do not invoke that portion of the statutory provision, nor do they purport to make the requisite showing of need.

In any event, common sense supports a stay of all discovery in this case, even under the rationale of *Tobias.*Unlike the situation in *Tobias,* plaintiffs' federal and common law claims each derive from the same factual allegations: namely, that defendants Bendell and Major affirmatively misrepresented the value of Major's stock as a means of inducing plaintiffs to enter into an unfair buyout. To allow discovery on any one of plaintiffs' claims would open the door to otherwise currently undiscoverable information related to plaintiffs' federal securities law claim, and would undermine the purpose of the PSLRA's automatic stay provision. *See Angell Invs., L.L.C. v. Purizer Corp.,* No. 01 C 6359, 2001 WL 1345996, at *1–2 (N.D.Ill. Oct.31, 2001) (staying discovery on negligent misrepresentation claim, which was "related closely enough to the federal securities law claims" to involve the same discovery; distinguishing *Tobias* as involving state law claims that are "separate and distinct" from the federal securities claims). Therefore, all discovery in this case will be stayed pending a judicial determination of defendants' pending dispositive motion.

### *CONCLUSION*

*6 For the reasons stated above, the Court grants defendants' motion to stay discovery pending the outcome of their motion for judgment on the pleadings. Having concluded that a discovery stay is warranted, the Court denies plaintiffs' motion to compel discovery.

Any objections to the recommendations contained in this Report and Recommendation must be filed with the Honorable Frederic Block on or before ***April 30, 2012.*** *See* Fed.R.Civ.P. 72. Failure to file objections in a timely manner may waive a right to appeal the District Court order.

The Clerk is directed to enter this Report and Recommendation into the ECF system.

**SO ORDERED.**

**All Citations**

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Only the Westlaw citation is currently available.
United States District Court, N.D. California.
Oakland Division

IPVX Patent Holdings, Inc., a Delaware corporation, Plaintiff,
v.
8X8, Inc., a Delaware corporation, Defendant.

Case No: C 13–01707 SBA
| Filed November 12, 2013

**Attorneys and Law Firms**

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**ORDER**

**Docket 83**

SAUNDRA BROWN ARMSTRONG, United States District Judge

*1 The parties are presently before the Court on Defendant 8x8, Inc.'s ("Defendant") administrative motion to clarify the Court's directives regarding discovery. Dkt. 83. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby STAYS all proceedings in this case until Defendant's motion to disqualify Plaintiff's counsel is resolved.

## I. *BACKGROUND*

On November 1, 2011, Plaintiff IPVX Patent Holdings, Inc. ("Plaintiff") commenced the instant patent infringement action against Defendant in the Eastern District of Texas. *See* Compl., Dkt. 1. On August 23, 2012, Defendant filed a motion to transfer venue to either the District of Delaware or to the Northern District of California under 28 U.S.C. § 1404(a). Dkt. 25. An amended complaint was filed on September 25, 2012. Dkt. 31. On March 21, 2013, the district court in the Eastern District of Texas issued an order transferring this case to the Northern District of California. Dkt. 40. On May 23, 2013, the case was assigned to the undersigned. Dkt. 52.

On August 20, 2013, Defendant filed a motion to disqualify Plaintiff's counsel and a motion to dismiss. Dkt. 71, 73. On August 21, 2013, the Court issued an order referring the motion to disqualify Plaintiff's counsel to the Chief Magistrate Judge or her designee for determination. Dkt. 75. On that same day, the Court also issued a minute order stating that Defendant's motion to dismiss will be held in abeyance pending a ruling on Defendant's motion to disqualify Plaintiff's counsel. Dkt. 76. The motion to disqualify Plaintiff's counsel was subsequently assigned to Magistrate Judge Westmore and is currently set for hearing on November 21, 2013. *See* Dkt. 82.

On October 7, 2013, Plaintiff propounded interrogatories and requests for production of documents on Defendant which, among other things, seek "highly sensitive" financial information as well as technical documents such as schematics, plans, manuals and memorandums relating to Defendant's technology. Def.'s Mtn. at 3. On October 21, 2013, Defendant filed an administrative motion to clarify the Court's directives regarding discovery. Dkt. 83. Plaintiff filed a response on October 25, 2013. Dkt. 84.

## II. *DISCUSSION*

The court has inherent authority to manage the cases before it. *Landis v. N. Am. Co.*, 299 U.S. 248, 254–255 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."). A "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including forbidding discovery or specifying terms, including time and place, for discovery. Fed.R.Civ.P. 26(c)(1). "The burden is upon the party seeking the order to 'show good cause' by demonstrating harm or prejudice that will result from the discovery." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir.2004). A stays of proceedings in federal court, including a stay of discovery, is committed to the discretion of the trial court. *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir.1987); *seeLittle v. City of Seattle*, 863 F.2d 681, 685 (9th Cir.1988) (a district court had wide discretion in controlling discovery).

*2 In the instant motion, Defendant seeks clarification as to whether the Court intended to stay all proceedings, including discovery, pending a determination of its motion to disqualify Plaintiff's counsel, which is premised on the improper use and disclosure of Defendant's confidential information by Plaintiff's co-counsel. Def.'s Mtn. at 1, 4. According to Defendant, it "understands" the Court's August 21, 2013 minute order, which states that Defendant's motion to dismiss will be held in abeyance pending a ruling on Defendant's motion to disqualify Plaintiff's counsel, as staying this action "pending determination of the disqualification issues." *Id.* Plaintiff disagrees, asserting that it does not "understand" the Court's minute order as staying discovery in this case. Dkt. 84.

Having reviewed the record, the Court finds that the August 21, 2013 minute order did not stay discovery in this case pending resolution of Defendant's motion to disqualify Plaintiff's counsel. However, the Court finds that Defendant has shown good cause to stay discovery until Defendant's motion to disqualify Plaintiff's counsel is resolved. Staying discovery will avoid the possibility that the parties will unnecessarily expend time and resources conducting discovery. If the motion to disqualify Plaintiff's counsel is granted, the parties will have wasted time and resources propounding and responding to discovery requests. Moreover, a limited stay of discovery is appropriate to prevent Plaintiff's counsel from obtaining technical and financial information about Defendant before a determination is made as to whether Plaintiff's counsel may continue to represent Plaintiff in this action. Finally, Plaintiff has not shown that a limited stay of discovery will impose any unfair prejudice on it.

In light of the forgoing, the Court hereby STAYS discovery in the instant action until Defendant's motion to disqualify Plaintiff's counsel is resolved. To the extent Defendant requests an order staying discovery pending resolution of its motion to dismiss, the Court denies this request. Defendant has failed to demonstrate good cause to stay discovery until its motion to dismiss is resolved.

## III. *CONCLUSION*

For the reasons stated above, IT IS HEREBY ORDERED THAT:

1. Discovery is STAYED pending resolution of Defendant's motion to disqualify Plaintiff's counsel.

2. This Order terminates Docket 83.

IT IS SO ORDERED.

### All Citations

Not Reported in F.Supp.2d, 2013 WL 6000590

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Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Michael KANOWITZ, Steven Roy, Helene Cranmer, Charles Hydo, and Daniel Sturchio, on behalf of themselves and all others similarly-situated, Plaintiffs,
v.
BROADRIDGE FINANCIAL SOLUTIONS, INC., Defendant.

No. CV 13–649(DRH)(AKT).
| Signed March 31, 2014.

**Attorneys and Law Firms**

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Jeremy M. Brown, Daniel Robert Levy, Epstein Becker & Green, P.C., Newark, NJ, for Defendant.

**MEMORANDUM AND ORDER**

A. KATHLEEN TOMLINSON, United States Magistrate Judge.

## I. *PRELIMINARY STATEMENT*

***1** This is a class action lawsuit alleging claims of (1) unpaid wages in violation of Article 6 of the New York Labor Law, §§ 190 *et seq.*, (2) breach of contract, and (3) other claims that "can be inferred from the facts" against Defendant Broadridge Financial Solutions, Inc. ("Defendant" or "Broadridge"). *See* Complaint ("Compl.") [DE 1]. This action is brought by Plaintiffs Michael Kanowitz, Steven Roy, Helene Cranmer, Charles Hydo and Daniel Sturchio (collectively, "Plaintiffs") on behalf of themselves and all similarly-situated employees. *Id.* The Plaintiffs alleges that Broadridge failed to pay them non-discretionary wages despite their satisfaction of objective criteria set forth in Defendant's Fiscal Year 2009 Management by Objectives (MBO) Bonus Plan Document. *Id.* ¶ 1.

Before the Court is Defendant's motion for a full stay of discovery pending the disposition of its anticipated motion to dismiss the Complaint for lack of subject matter jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(4) (B). *See* Defendant's Motion to Stay Discovery ("Def.'s Mot.") [DE 14]. Defendant argues that this Court lacks jurisdiction in light of the "home state" and "local controversy" exceptions set forth in CAFA, "which are triggered when two-thirds of the putative plaintiff class and the defendant is a citizen of the state in which the action was filed." *Id.* at 1. As, such, Broadridge submits that there is "no basis for jurisdictional or any other discovery." *Id.* In opposition, Plaintiffs contend that Defendant has not provided sufficient evidence that CAFA applies and that limited discovery is warranted to determine whether two-thirds of the putative plaintiff class and the defendant are indeed citizens of New York State. *See* Plaintiffs' Opposition to the Motion to Stay Discovery ("Pls.' Opp.") [DE 15]. For the reasons set forth below, Defendant's motion to stay discovery is GRANTED, in part, and DENIED, in part.

## II. *BACKGROUND*

### A. The Complaint

In Fiscal Year 2009, a period which began on July 1, 2008 and ended on June 30, 2009, Broadridge implemented and published a bonus payment plan entitled the "FY '09 Management by Objectives (MBO) Bonus Plan Document."Compl. ¶ 1. According to the Complaint, the MBO Bonus Plan Document contained both discretionary and objective bonus provisions. *Id.* The discretionary portion of the Bonus Plan "carried a 10% weight." *Id.* The objective section, by contrast, constituted 90% of the weight of the plan. *Id.* At the beginning of Fiscal Year 2009, the named Plaintiffs and the Class Action Plaintiffs were provided with the Bonus Plan Document which outlined the criteria under the plan. *Id.* Although the named Plaintiffs and the Class Action Plaintiffs satisfied the objective criteria, Defendant either "slashed" or refused to pay Plaintiffs the amount that they had earned. *Id.* Plaintiffs argue that "[t]hese totals are due and owing to Plaintiffs and Class Action Plaintiffs as unpaid wages." *Id.* In the alternative, Plaintiffs maintain that "Defendant's failure to pay this money to Plaintiffs and Class Plaintiffs is a breach of contract entitling Plaintiffs and Class Plaintiffs to damages." *Id.*

***2** Relevant to the motion before the Court is Plaintiffs' allegation in the Complaint that the basis for subject matter jurisdiction is 28 U.S.C. § 1332(d). Compl. ¶ 2. Plaintiffs claim that the "amount in controversy exceeds the sum or value of $5,000,000 and at least one member of the class of plaintiffs is a citizen of a different state than Defendant Broadridge." *Id.* The Complaint alleges that all five

individually-named Plaintiffs are citizens of the State of New York and were employed by Broadridge during Fiscal Year 2009. *Id.* ¶ 4. Broadridge is alleged to be "a corporation organized and existing under the laws of Delaware" and "according to the New York State Department of State," maintains a "principal executive office" at 2 Journal Square, Jersey City, New Jersey 07306." *Id.* ¶ 5.

Plaintiffs seek class certification under Rule 23(a) and 23(b)(3).*See* Compl. ¶¶ 7–8. Specifically, Plaintiffs seek to certify the following class:

> Current and former employees of Defendant who worked for Defendant during the Defendant's 2009 fiscal year, i.e. from July 1, 2008 through June 30, 2009, and who were eligible to receive a bonus under the Defendant's MBO Bonus Plan applicable to the 2009 fiscal year.

*Id.* ¶ 9. The Plaintiffs contend that the proposed class will satisfy the requirements of both Rule 23(a) and 23(b)(3).*Id.* ¶¶ 10–20.Plaintiffs further note that "[t]here are over 100 known employees of the Defendant who fit the class definition outlined above; many hundreds more may exist."*Id.* ¶ 10.

On or about September 1, 2008, Broadridge published the Fiscal Year 2009 MBO Bonus Plan Document. Compl. ¶ 27. The cover page of the document specifically stated that the plan was "retroactive to or 'effective' as of July 1, 2008."*Id.* All named Plaintiffs were employed at Broadridge during the entirety of Fiscal Year 2009 according to the Complaint. *Id.* ¶¶ 21–26.The purpose of the MBO Bonus Plan was to "[p]rovide designated associates with individual goals that are aligned with [Broadridge's] business goals and to reward associates when the organization achieves its goals."*Id.* ¶ 28 (internal quotations omitted). The MBO Bonus Plan was calculated on the basis of four components: (1) financial results, (2) client satisfaction, (3) projects/initiatives, and (4) leadership. *Id.* ¶ 30.The MBO Bonus Plan Document explained how to calculate the different components. *Id.* ¶ 31.The Plaintiffs allege that the leadership component was the only discretionary section and that it carried a 10% weight. *Id.*"Thus, based on this language and simple logic," Plaintiffs conclude, "all other components of the MBO Bonus Plan, comprising the other 90% of the calculation, were to be calculated on a non-discretionary basis."*Id.* Supervisors employed by Broadridge "explained to Plaintiffs and Class Action Plaintiffs exactly what they had to do to earn 90% of their objectively-calculated bonuses for that year."*Id.* ¶ 33.

***3** At the end of Fiscal Year 2009, supervisors submitted the calculations for approval. Compl. ¶ 34. Plaintiffs claim that [u]pon such submission, even though the eligible employees had spent the previous year working towards and striving to meet such objectively-set criteria, the Defendant's upper-level supervisors determined that none of the employees' bonuses could exceed a certain percentage even if those employees had earned a higher percentage in accordance with the objectively-based formula as set [forth] ... in the 2009 MBO Bonus Plan Document." *Id.* ¶ 35.Consequently, Plaintiffs contend, "Broadridge recalculated and slashed the bonuses of its Plan-eligible employees, including the five named Plaintiffs and the Class Action Plaintiffs, who had earned a higher bonus amount under Broadridge's announced and pre-determined objective formula."*Id.* ¶ 36.Thereafter, "Broadridge paid to Plaintiffs and Class Action Plaintiffs such lower amounts and not the amounts that Plaintiffs and Class Action Plaintiffs had objectively earned over the course of the 2009 fiscal year."*Id.*

In Count I of the Complaint, Plaintiffs assert a cause of action for unlawfully withheld wages under New York Labor Law §§ 190, *et seq.* Compl. ¶¶ 39–42. In Count II, Plaintiffs allege a cause of action for breach of contract under New York state common law. *Id.* ¶¶ 45–50.

**B. Procedural History**

***1. Defendant's Pre–Motion Conference Letter***

On April 10, 2013, Defendant filed a letter to Judge Hurley requesting a pre-motion conference for purposes of moving to dismiss the Complaint, pursuant to FED. R. CIV. P. 12(b)(1), for lack of subject matter jurisdiction. DE 10. Defendant argued that the Court is deprived of subject-matter jurisdiction in light of the "home state" and "local controversy" exceptions to CAFA since more than two-thirds of the putative class and Broadridge are citizens of the same state—New York. *Id.* at 1–2.In their April 3, 2013 responding letter to Judge Hurley, Plaintiffs consent to a pre-motion conference but argue that factual issues exist with respect to the citizenship of Broadridge and the putative Class Plaintiffs. DE 12 at 2. As such, "Plaintiffs ... request discovery into the factual contentions of citizenship that the Defendant raises in its letter."*Id.* at 3. However, Plaintiffs take no position with respect to merits-based discovery. *Id.*

*2. The Initial Conference*

On April 11, 2013, the parties appeared before this Court for an Initial Conference. DE 13. The Court acknowledged that "Defendant is seeking to stay all discovery pending the submission and determination of its intended motion to dismiss."*Id.* Plaintiffs' counsel asserted that they seek discovery to proceed, "at least with regard to permitting discovery on the issue of subject matter jurisdiction."*Id.* In light of the request to stay discovery and the anticipated motion before Judge Hurley, the Court stated that:

> ***4** After hearing from both sides today, I advised counsel that I believe it is appropriate for this Court to take a further look, in a more formal way, at the arguments and cases cited by defendant's counsel this morning, in addition to giving plaintiffs' counsel an opportunity to argue why limited discovery should not proceed, notwithstanding defendant's legal arguments. Although the Court realizes that there is some overlap between the merits of this action and a request for a complete stay, I have asked counsel to focus on the "stay" argument as much as possible. Defendant's counsel will file a letter motion, not to exceed three pages, on ECF by April 22, 2013 seeking a full stay of discovery pending the anticipated motion to dismiss. Plaintiffs' counsel will file his opposition to the letter motion by April 29, 2013. Counsel are free to attach any pertinent exhibits which help to focus the issue of the proposed stay of all discovery.

*Id.*

*3. Judge Hurley's Stay of Dispositive Motion Practice*

In the wake of the Initial Conference and the permission granted to brief the issue of whether discovery should be stayed, Judge Hurley issued an Electronic Order holding Defendant's request for a pre-motion conference to file a motion to dismiss in abeyance. *See* Apr. 12, 2013 Electronic Order. Specifically, Judge Hurley held that "Defendant's request for a pre-motion conference in anticipation of moving to dismiss pursuant to Rule 12(b)(1) is hereby held in abeyance pending Magistrate Judge A. Kathleen Tomlinson's determination on the forthcoming motion to stay discovery."*Id.*

**C. The Current Motion to Stay Discovery**

In accordance with this Court's directives, Defendant filed a letter motion to stay discovery, maintaining that exceptions within CAFA prohibit this action from proceeding in federal court. *See generally* Def.'s Mot. Defendant maintains that "a full stay of discovery is warranted since Plaintiffs' claims will likely be dismissed, the burdens of discovery would be extensive and unnecessary, and a stay will not result in any prejudice to the Plaintiffs."*Id.* at 1.

The Defendant claims that both Broadridge, as a New York corporation, and more than two-thirds of the putative class members are citizens of New York State. Def.'s Mot. at 1. As a result, the Defendant argues, the action lacks subject matter jurisdiction under CAFA. *Id.* Further, Defendant contends that the breadth of discovery and the burden it presents justifies a full stay pending Judge Hurley's decision on the anticipated motion to dismiss. *Id.* at 3. Third, Plaintiffs will not be prejudiced by a full stay of discovery, particularly because of their "declared intention to re-file in state court" in the event this action is dismissed for want of jurisdiction. *Id.* In this vein, Defendant asserts that they have demonstrated the requisite "good cause" to stay discovery. *Id.*

In response, Plaintiffs point out that there remains a dispute about whether the citizenship of Broadridge and that of the putative class is, in fact, consistent with Defendant's representations. *See* Pls.' Opp. at 1. Plaintiffs state "[a]s the Court further knows, based on publicly available information that the Defendant put on file with the State of New York, Plaintiffs commenced this action with the belief that the Defendant's principal place of business was located in New Jersey."*Id.* at 1–2.As Plaintiffs put it, "[i]n one declaration, the Defendant asserts that its principal place of business is truly in New York, but then boldly admits that the information about its principal executive office location on file with New York is not a mistake."*Id.* at 2. [1] Plaintiffs gather that Defendant "intentionally provided such misinformation, to a state agency, for the purpose of its own 'administrative convenience.' "*Id.* (quoting Declaration of Mark D. DiGidio annexed to Def.'s Mot. as Exhibit "B" ["DiGidio Decl."] at 5–6).

1 Here, Plaintiffs are referring to the listing of Defendant's "principal executive office" in Jersey City, New Jersey with the New York Department of State.

*5 Secondly, Plaintiffs takes issue with the "redacted chart" supplied by the Defendant listing the members of the putative class. Pl.'s Opp. at 2. The chart, Plaintiffs claim, is defective because "the only information that the Defendant provides are the town and state in which it contends each class member lives or lived at some point."*Id.* Plaintiffs take issue with the fact that Defendant "redacts the names and street addresses of each putative class member and does not provide a phone number or any other means for *anyone* to be able to verify the accuracy of the chart's details."*Id.* (emphasis in original).

Plaintiffs propose that "the Court order the Defendant to produce the complete chart of the putative class, without redaction, and with the addition of a column containing a contact number for each individual."Pls.' Opp. at 2. Thereafter, at their own expense, Plaintiffs will "randomly select a handful of putative class members and attempt to contact them to verify the information about them that the Defendant has provided."*Id.* Plaintiffs maintain that, if the "defendant's information proves accurate," the Plaintiffs will concede that Defendant's anticipated motion to dismiss is unnecessary. *Id.* Alternatively, if the data disclosed by this exercise is inconsistent with Defendant's representation as to the putative class, "Plaintiff will then request broader discovery from the Court."*Id.* This activity, Plaintiffs maintain, "poses absolutely no prejudice" to the Defendant on the rationale that the foregoing discovery materials will have to be supplied to Plaintiff in any event once merits-based discovery commences, either in the instant forum or in state court. *Id.*

## IV. *DISCUSSION*

Federal Rule of Civil Procedure 26(c) provides that "for good cause shown," a district court may, in its discretion, stay discovery or issue a protective order limiting discovery to certain matters. *See*FED. R. CIV. P. 26(c). A party seeking a protective order has the burden of showing that good cause exists for issuance of that order. *See, e.g. Gambale v. Deutsche Bank AG,* 377 F.3d 133, 142 (2d Cir.2004); *Garnett–Bishop v. New York Community Bancorp, Inc.,* No. 12 Civ. 2285, 2013 WL 101590, at *1 (E.D.N.Y. Jan 8, 2013). Further, it is well-settled in this District that litigants are not entitled to an automatic stay of discovery pending the determination of a motion to dismiss. *See Bachayeva v. Americare Certified Special Servs.,* No. 12 Civ. 1446, 2013 WL 4495672, at *4 (E.D.N.Y. Aug. 20, 2013) (issuance of a stay of discovery pending the outcome of a motion to dismiss is "by no means automatic") (internal citation and quotations omitted); *Thomas v. New York City Dep't of Educ.,* 09 Civ. 5167, 2010 WL 3709923, at *3 (E.D.N.Y. Sept.14, 2010) ("the pendency of a dispositive motion is not, without more, grounds for an automatic stay" of discovery) (internal citations omitted); *Rivera v. Incorporated Village of Farmingdale,* 06 Civ. 2613, 2007 WL 3047089, at *1 (E.D.N.Y. Oct.17, 2007) (citations omitted) ("the law is clear in this court that there is no automatic stay of discovery pending the determination of a motion to dismiss") (internal citation omitted); *Osan Ltd. v. Accenture LLP,* No. 05 Civ. 5048, 2006 WL 1662612, at *1 (E.D.N.Y. June 13, 2006) (denying motion to stay discovery during pendency of potentially dispositive motion); *Telesca v. Long Island Hous. P'ship, Inc.,* No. 05 Civ. 5509, 2006 WL 1120636, at *1 (E.D.N.Y. Apr. 27, 2006) (collecting cases from within this district noting that the "pendency of a dispositive motion is not, in itself, an automatic ground for a stay"). As one court has noted:

> *6 Staying discovery pending judicial evaluation of the sufficiency of the complaint is consistent with the entire purpose of the stay provision[, which] is to avoid saddling defendants with the burden of discovery in meritless cases, and to discourage the filing of cases that lack adequate support for their allegations in the mere hope that the traditionally broad discovery proceedings will produce facts that could be used to state a valid claim.

*Gardner v. Major Auto. Companies,* 11 Civ. 1664, 2012 WL 1230135, at *3 (E.D.N.Y. Apr.12, 2012) (internal citation and quotations omitted). Factors which courts have considered when determining whether or not a stay is appropriate include:

> (1) whether the defendant has made a strong showing that the plaintiff's claim is unmeritorious; (2) the breadth of discovery and the burden of responding to it; and (3) the risk of unfair prejudice to the party opposing the stay.

*Chesney v. Valley Stream Union Free Sch. Dist. No. 24,* 236 F.R.D. 113, 115 (E.D.N.Y. Mar.28, 2006) (internal citation omitted); *see also Thomas,* 2010 WL 3709923, at *3;*RxUSA Wholesale, Inc. v. Alcon Labs, Inc.,* No. 06 Civ. 3447, 2006 U.S. Dist. LEXIS 92816, at *5–6 (E.D.N.Y. Nov. 28, 2006). Where a discovery stay is sought pending a dispositive motion, another consideration which may be evaluated is the strength of the motion and likelihood of whether the case could be dismissed based upon the merits of the motion. *See, e.g., Spencer Trask Software & Info. Servs. v. RPost Int'l,* 206 F.R.D. 367, 368 (S.D.N.Y.2002). Additionally, courts may take into account the nature and complexity of the action, whether some or all defendants have joined in the request for a stay, and the posture or stage of the litigation. *See Chesney,* 236 F.R.D. at 115.

**A. Whether Broadridge Has Made a Strong Showing that Plaintiffs' Claims are Unmeritorious**

In assessing whether Plaintiffs' claims are unmeritorious, the Court turns its attention to the "home state" and "local controversy" exceptions within CAFA which Defendant argues provide the grounds for the dismissal of this action."CAFA allows for the exercise of federal diversity jurisdiction over class actions involving 100 or more class members, in which the amount in controversy exceeds the sum or value of $5,000,000 (exclusive of interest and costs), and there is minimal diversity, *i.e.,* where, *inter alia,* at least one member of the putative class and one defendant are citizens of different states."*Richins v. Hofstra University,* 908 F.Supp.2d 358, 360 (E.D.N.Y.2012) (citing *Anirudh v. CitiMortgage, Inc.,* 598 F.Supp.2d 448, 450 (S.D.N.Y.2009); 28 U.S.C. § 1332(d)(2)(A))."CAFA thus expands federal diversity jurisdiction allowing removal of cases lacking complete diversity of citizenship among the parties."*Id.* (citing *BlackRock Financial Management Inc. v. Segregated Account of Ambac Assur. Corp.,* 673 F.3d 169, 175 (2d Cir.2012))."By legislating the expansion of diversity jurisdiction, Congress intended to allow federal courts to keep 'cases of national importance' in Federal court, and 'to restore the intent of the framers of the Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.'"*Id.* (citing *Mattera v. Clear Channel Communications, Inc.,* No. 06 Civ. 1878, 2006 WL 3316967 *7 (S.D.N.Y. Nov. 14, 2006)).

*7 A brief description of the CAFA "home state" exception may shed some light on the evidentiary requirements which Defendant must prove in order to sustain its motion to dismiss:

> CAFA includes several exceptions, including the home state exception which provides that: "[a] district court shall decline to exercise jurisdiction ... over a class action in which ...*two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."*

*Gold v. New York Life Ins. Co.,* 730 F.3d 137, 141 (2d Cir.2013) (quoting 28 U.S.C. § 1332(d)(4)(B)) (emphasis added). Additionally, "when jurisdiction is based on CAFA, the party seeking to avail itself of an exception to CAFA jurisdiction over a case originally filed in federal court bears the burden of proving the exception applies."*Anirudh v. CitiMortgage, Inc.,* 598 F.Supp.2d 448, 451 (S.D.N.Y.2009). Therefore, in the instant case and for the purposes of this motion, Defendant has the burden of showing that the "home state" exception has been met by a preponderance of the evidence. *See Richins,* 908 F.Supp.2d at 362. [2]

2 The Court notes that "[t]he Second Circuit has not resolved the level of proof required to establish an exception to CAFA jurisdiction."*Hart v. Rick's N.Y. Cabaret Intern., Inc.,* 2014 WL 301357, at *5 (S.D.N.Y. Jan.28, 2014)."Some Circuits have applied a preponderance of the evidence standard."(internal citations omitted)."One district court in this Circuit has applied a reasonable likelihood standard."*Id.* (citing *Mattera,* 239 F.R.D. at 80 ("While Defendants have not provided evidence, in the form of an affidavit or otherwise, establishing such citizenship, it is reasonably likely that more than two-thirds of the putative class members of the proposed class—all of whom work in New York—are citizens of New York."). In *Hart* and *Richins,* the courts applied a "preponderance of the evidence" burden of proof. *See Hart,* 2014 WL 301357, at *5;*see also Richins,* 908 F.Supp.2d at 362.

Congress also carved out the "local controversy exception" under 28 U.S.C. § 1332(d)(4)(A). "Under the "local controversy" exception" [a] district court shall decline to exercise jurisdiction ...

(A) (i) over a class action in which—

> (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims ass2erted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3–year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons[.]

*Brook v. UnitedHealth Group, Inc.*, No. 06 Civ. 12954, 2007 WL 2827808, at *3 (S.D.N.Y. Sept.27, 2007) (quoting 28 U.S.C. § 1332(d)(4)(A)); *Henry v. Warner Music Group Corp.*, No. 13 Civ. 5031, 2014 WL 1224575, at *4 (E.D.N.Y. Mar.24, 2014).

In the instant case, Defendant has "produced from its Human Resources database the home address information (town, state and zip code) for the 870 individuals within Plaintiffs' definition of the putative class; 700 current employees and 170 former employees."Def.'s Mot. at 2 (citing Declaration of Douglas Myers, Senior Director, Human Resources ["Myers Decl."] annexed as Exhibit A to Pl.'s Mot. ¶¶ 3–5). In sum, Myers identified 865 (751 of 870 employees) members of Plaintiffs' putative class who are residents of New York State. *Id.* (citing Myers Decl. ¶ 7). This number more than satisfies the two-thirds residency requirement under the CAFA "home state" and "local controversy" exceptions.*Id.*

*8 The Court is not persuaded by Plaintiff's argument that the information supplied by Defendants does not sufficiently establish that more than two-thirds of the putative class members are residents of New York State. As an initial matter, the Defendant appropriately redacted the names and street addresses of these individuals given the early stage of litigation. Second, Plaintiffs' contention—that the listing of Defendant's "principal executive office" with the Department of State is indicative of the tendency of Defendant to misrepresent and misinform the Court—is unsupported. The Court finds credible Defendant's position that the New Jersey office was listed for purposes of administrative convenience and does not govern Broadridge's "principal place of business." This representation is supported by the declaration of Defendant's associate general counsel, which is discussed in further detail below. The Supreme Court has held that the "principal place of business" of a corporation is defined by its "nerve center." *Hertz Corp. v. Friend,* 559 U.S. 77, 130 S.Ct. 1181, 1186, 175 L.Ed.2d 1029 (2010) (defining "principal place of business" as its "nerve center"—"the place where the corporation's high level officers direct, control, and coordinate the corporation's activities").

In *Richins,* the defendants argued that plaintiffs needed to show additional proof that more than two-thirds of the putative class members were residents of New York State which would thereby qualify the case for mandatory and discretionary remand to state court under CAFA. *Richins,* 908 F.Supp.2d at 363. The defendants in *Richins* provided a chart illustrating the percentage of Hofstra University graduates with New York mailing addresses on file. *Id.* at 362.The court found that "[t]he data and calculations set forth by Plaintiffs support strongly the argument that greater than two-thirds of the members of the Plaintiff Class are citizens of the State of New York."*Id.* at *362–63.Although defendants did not dispute the accuracy of the data there, they did dispute whether the data reflected the citizenship of the putative class members since the data was restricted to mailing addresses on file.*Id.* The Court ultimately rejected defendants' contentions, holding that

> [t]aken to its logical conclusion, Hofstra's argument would require this court to conduct a full trial on the merits as to the citizenship of every class member before reaching a determination of whether or not a CAFA exception applies. That cannot be the intent of the statute. Indeed when determining in the context of a motion to remand whether a CAFA exception applies, the court is required to make a citizenship determination at the very early stages of the litigation.

*Id.* Here, the Court finds the data supplied by Broadridge to be even more substantial than that provided by the plaintiffs in *Richins.*Defendants have provided the hometown, state, and zip codes of the putative class members both currently and formerly employed with Broadridge. *See* Myers Decl., Ex. "A" and "B."

*9 The court in *Richins* ordered expedited discovery on the issue of whether the action should be remanded to state court pursuant to CAFA, 28 U.S.C. § 1332(d)(3).*Richins,* 908 F.Supp.2d at 360. This is the single case relied upon by the Plaintiffs to argue that this Court, too, should order expedited discovery. Pls.' Opp. at 3. In *Richins,* Defendants removed the action from state court to federal court pursuant to CAFA. *Richins,* 908 F.Supp.2d at 360. In response, the plaintiffs sought a mandatory remand and the court found that additional discovery was necessary to confirm whether the two-thirds threshold had been met under 28 U.S.C. § 1332(d)(3).*Id.* The instant case is distinguishable from *Richins.*First, the Court has, in effect, already permitted limited discovery by allowing the parties to attach supporting evidence to the motion to stay discovery. *See* DE 13 ("Counsel are free to attach any pertinent exhibits which help to focus the issue of the proposed stay of all discovery."). Second, as Plaintiffs point out, the *Richins* plaintiffs "did not request the names, street addresses and contact numbers of the putative class members."Pls.' Opp. at 3. Moreover, the court in *Richins* ultimately found the showing made by the defendants there to be far less substantial than the information presented by Broadridge here to meet the two-thirds residency threshold under CAFA.

Moreover, Defendant has satisfactorily demonstrated that it is a citizen of the State of New York, notwithstanding that its "principal executive office" is listed with the New York Department of State as Jersey City, New Jersey. Defs.' Mot. at 2. Under federal law, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."28 U.S.C. § 1332(c) (1)."This provision 'establishes a theory of dual citizenship for corporations and if either the corporation's place of incorporation or principal place of business destroys diversity, then the courts will not have diversity jurisdiction.'"*Brauner v. British Airways PLC,* No. 12 Civ. 343, 2012 WL 1229507, at *3 (E.D.N.Y. Apr. 12, 2012) (quoting *Sty–Lite Co. v. Eminent Sportswear Inc.,* 115 F.Supp.2d 394, 398 (S.D.N.Y.2000)).

Defining a corporation's "principal place of business" is based on an evaluation of several factors. "Recent Supreme Court precedent holds that a corporation's 'principal place of business' is 'the place where a corporation's officers direct, control, and coordinate the corporation's activities, often called the 'nerve center.' "*Brauner,* 2012 WL 1229507, at *3 (quoting *Hertz Corp.,* 130 S.Ct. at 1192); *FirstStorm Partners 2 LLC v. Vassel,* No. 10 Civ. 2356, 2012 WL 1886942, at *5 (E.D.N.Y. Mar. 8, 2012)."[I]n practice it should normally be the place where the corporation maintains its headquarters ...."*Brauner,* 2012 WL 1229507, at *3 (quoting *Hertz,* 130 S.Ct. at 1193)."A corporation has only one principal place of business."*Id.* (citing *Hertz,* 130 S.Ct. at 1193).

*10 Here, Defendant has provided a Declaration from Associate General Counsel Mark DiGidio to support its representation that its "principal place of business" is Lake Success, New York—not Jersey City, New Jersey. *See* DiGidio Decl. In his declaration, DiGidio represents that Defendant's principal place of business is located at 1981 Marcus Avenue, Lake Success New York. *Id.* ¶ 1. Broadridge, DiGidio explains, has "maintained its headquarters at the Lake Success, New York location since 2007."*Id.* ¶ 3. Furthermore, DiGidio states that it is at the Lake Success, New York location where Broadridge's "principal corporate officers direct, control and coordinate Broadridge's operations and activities on a daily basis."*Id.* ¶ 4. Among these officers are Broadridge's (1) Chief Executive Officer and Director, (2) President, (3) Corporate Senior Vice President and Chief Operating Officer, (4) Corporate Vice President and Chief Financial Officer, (5) Corporate Vice President, (6) General Counsel and Secretary, (7) Corporate Vice President, Human Resources, and (8) Corporate Vice President, SPS International and Global Outsourcing Solutions. *Id* . The Court finds this information compelling with regard to the argument that Broadridge's principal place of business is in New York. Moreover, courts in the Second Circuit regularly find a corporate officer's sworn statement to be sufficient proof of a corporation's principal place of business. *See Strix, LLC v. GE Capital Comm.,* 11 Civ. 4403, 2012 WL 2049825, at *2 (E.D.N.Y. May 7, 2012); *FirstStorm Partners 2 LLC,* 2012 WL 1886942, at *5.

The Court is not ignoring the fact that Defendant has listed a "principal executive office" in Jersey City, New Jersey in its filings with the New York State Department of State. Pls.' Opp. at 2; Defs.' Opp. at 2–3. The mere listing of a non-New York "principal executive office" with a state agency is, however, not determinative of Defendant's "principal place of business" under federal law. *See Hertz,* 130 S.Ct. at 1194. Moreover, as stated in DiGidio's sworn declaration, a Jersey City, New Jersey location was listed for "administrative convenience so as to ensure that any formal tax notifications from New York State would be sent directly to the tax department and timely addressed."DiGidio Decl. ¶ 6. Given

these facts, the Court finds that Defendant will likely show that the Court lacks jurisdiction over this matter pursuant to the "home state" and "local controversy" exceptions of CAFA. As a result, Broadridge has shown that the Complaint is "unmeritorious" in the sense that diversity jurisdiction cannot be sustained in these circumstances. The first factor therefore weighs in favor of a stay.

**B. The Breadth of Discovery and the Burden of Responding to It**

While the Court notes that Defendant has provided some evidence that the Complaint may be dismissed, this factor is not dispositive and the Court must also review other factors in exercising its discretion to stay discovery under Rule 26(c).*See Ceglia v. Zuckerberg,* No. 10 Civ. 569A(F), 2012 U.S. Dist. LEXIS 85633, at *3 (W.D.N.Y.2012) ("In finding good cause, a court is required to balance several relevant factors including the pendency of dispositive motions, potential prejudice to an opposing party, the extensiveness of the requested discovery, and the burden of the requested discovery on the requested party, *i.e.,* the party seeking the stay.") (internal citations omitted); *Ellington Credit Fund, Ltd. v. Select Portfolio Services, Inc.,* No. 08 Civ. 2437, 2009 WL 274483, at *1 (S.D.N.Y. Feb.3, 2009). Specifically, the first prong of the analysis relating to whether the claim is "unmeritorious" must be balanced against other factors when assessing whether a stay of discovery should be imposed. The Court must also assess the breadth and burden of discovery presented by this action. *Chesney,* 236 F.R.D. at 115; *Barnes v. County of Monroe,* No. 10 Civ. 6164, 2013 WL 5298574, at *1 (W.D.N.Y. Sept.19, 2013); *Bachayeva v. Americare Certified Special Services, Inc.* No. 12 Civ. 1466, 2013 WL 4495672, at *4 (E.D.N.Y. Aug. 20, 2013). Here, Defendant has sought leave from Judge Hurley to file a motion to dismiss the complaint for lack of subject matter jurisdiction. *See* DE 10. In light of Plaintiffs' intentions to re-file this action in state court, dismissal of the instant action will simply relegate discovery to the state court proceeding, not preclude it altogether. Although class action discovery would likely present a burden on the Defendant while its dispositive motion is pending, Plaintiffs will likely engage in similar class discovery in state court. *See Fantastic Graphics Inc. v. Hutchinson,* No. 09 Civ. 2514, 2010 WL 475309, at *3 (E.D.N.Y. Feb. 8, 2010) (denying defendant's motion to stay discovery because irrespective of the Court's ultimate decision on the issue of venue, the action was going to continue either "here or in New Jersey"). Like the circumstances in *Fantastic Graphics,* even if the Defendant's motion to dismiss is granted here, the case will likely be re-filed in state court rather than be abandoned in its entirety.

*11 Moreover, rather than seeking full-blown class discovery, Plaintiffs are simply seeking to verify the residency of the putative class members. *See* Pls.' Opp. at 2. To this end, the Court finds the Plaintiffs' proposal reasonable since they are not, at this stage, seeking to engage in merits discovery. *Id.* Plaintiffs seek to contact, at their own expense, a "handful of putative class members ... to verify the information" provided by Broadridge. Pls.' Opp. at 2. If the information supplied by Broadridge proves to be accurate, the Plaintiffs have proposed that they will forego further litigation in federal court and concede Defendant's representation that this Court lacks subject-matter jurisdiction. Pls.' Opp. at 2. As such, the Court does not find the limited scope of discovery requested by Plaintiffs to be burdensome. This factor tips the scale in Plaintiffs' favor.

**C. The Risk of Unfair Prejudice to the Plaintiffs**

Plaintiffs argue that they will be prejudiced if the Court does not permit limited discovery to determine whether the representations made by the Defendant concerning the residency of the putative class members is, in fact, true and verifiable. Pls.' Opp. at 2. Plaintiffs claim that if they are "to later learn in State court discovery that the Defendant's chart was inaccurate, they will not be able to halt the case and re-file here."*Id.* Permitting limited additional discovery on the narrow issue of whether the putative class-members are citizens of New York is appropriate here and mitigates potential prejudice to the Plaintiffs' ability to maintain this action in federal court. Defendants contend that there is no prejudice to implementing a full stay of discovery here since Plaintiffs can re-file the action in state court. Def.'s Mot. at 3. Granting leave for limited, expedited discovery in the present matter will not cause Defendant to "suffer the heavy burden of class action discovery."*Id.* Moreover, the limited production will not prejudice the Defendant because this information is ultimately going to be provided in some court. Finally, Plaintiffs state that they will "request broader discovery from the Court" if the representations in the unredacted data supplied by Broadridge are inconsistent with the results of their investigation. Pls.' Opp. at 2. The Court will address that issue if and when it materializes.

**D. Additional Considerations**

Finally, "[c]ourts also may take into consideration the nature and complexity of the action, whether some or all of the

defendants have joined in the request for a stay, and the posture or stage of the litigation."*Chesney,* 236 F.R.D. at 115. The Court appreciates the potentially complex nature of this action in light of the number of putative plaintiffs. At the same time, the Court points out that the causes of action are not particularly complex. Some discovery, therefore, would be beneficial to resolving the threshold issue of subject-matter jurisdiction, which may ultimately negate the necessity of Defendant's dispositive motion if Plaintiffs agree, as they represent, to foreclose litigation upon a review of the putative plaintiff's unredacted records. Moreover, discovery has been in limbo for over a year. In the interest of moving this case forward, the Court finds that a balance of the factors supports the granting of limited, expedited discovery to bring closure to the jurisdictional issues presented by the Defendant.

*12 In light of the foregoing analysis, the Court directs Broadridge to produce to Plaintiffs an updated and unredacted chart of the putative class members which includes their street addresses and phone numbers, no later than May 1, 2014. Plaintiffs will then have thirty (30) days from receipt of the updated chart to complete their verification of the Plaintiffs' state citizenship. Plaintiffs' communications with putative class members must be limited to their citizenship. Following this thirty-day period, the Plaintiffs are directed to file a letter with the Court confirming whether they have determined that the Court lacks subject-matter jurisdiction under the "home state" and/or "local controversy" exceptions of CAFA. If Plaintiffs believe further discovery is warranted, they must articulate a reasonable basis to the Court to justify such discovery while the Defendant's motion to dismiss is pending.

## V. *CONCLUSION*

For the foregoing reasons, the Defendant's motion to stay discovery is GRANTED, in part, and DENIED, in part, to the extent set forth in this Order.

*SO ORDERED.*

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United States District Court,
E.D. Texas,
Marshall Division.

James MORROW, and a Proposed Class of Other Similarly Situated Persons, Plaintiffs,
v.
CITY OF TENAHA DEPUTY CITY MARSHAL BARRY WASHINGTON, et al, Defendants.

Civil Action No. 2–08–cv–288–TJW. | July 30, 2010.

**Attorneys and Law Firms**

Wade Arnold Forsman, Attorney at Law, Sulphur Springs, TX, for Plaintiffs.

Gerald Vincent Bright, Walker Bright PC, Richardson, TX, for Defendants.

*MEMORANDUM OPINION AND ORDER*

T. JOHN WARD, District Judge.

*1 Pending before the Court are Defendant Lynda K. Russell's Second Opposed Motion for Protection Re: Staying Discovery Directed Toward Her (Dkt. No. 167) and Defendant Danny Green's Second Motion for Protection to Stay Discovery Directed Toward Him (Dkt. No. 169). In their motions, defendants Russell and Green request that the Court stay discovery directed towards them in this case, including but not limited to the taking of Russell's deposition currently noticed for August 3, 2010 and the taking of Green's deposition currently noticed for August 4, 2010. The Court held a hearing on these motions on July 30, 2010. Having considered the parties' briefing, the arguments at the hearing, and the applicable law, the Court is of the opinion that the motions should be DENIED.

I. *Background*

Plaintiffs bring this class action suit against five law enforcement officers and the mayor of Tenaha. Tenaha is located in Shelby County, Texas. The plaintiffs allege that the officers stopped the plaintiffs in traffic because of their race or ethnicity and unreasonably seized their money or property in violation of their constitutional rights. The plaintiffs further allege that there is a widespread pattern and practice of doing so in the city of Tenaha.

Plaintiffs sued, among others, Shelby County District Attorney Lynda K. Russell in her individual and official capacity and Shelby County District Attorney Investigator Danny Green in his individual capacity. On March 3, 2010, Defendant Russell filed an opposed motion for protection requesting that the Court stay or abate all discovery directed towards Russell pending resolution of certain criminal investigations (Dkt. No. 123). On March 31, 2010, Defendant Green filed a similar opposed motion for protection requesting that the Court stay or abate all discovery directed towards him pending the resolution of certain criminal investigations (Dkt. No. 134). After a hearing on the motions on April 15, 2010, the Court granted both motions and ordered a limited stay of discovery only as to defendants Russell and Green for a period of 90 days (Dkt. No. 149). That 90 day stay expired on July 14, 2010, and defendants Russell and Green now seek a further stay of discovery directed towards them.

II. *Analysis*

The Supreme Court has established that there exists no general constitutional, statutory, or common law prohibition against the prosecution of parallel criminal and civil actions, even where such actions proceed simultaneously.*SEC v. First Fin. Group of Texas, Inc.*, 659 F.2d 660, 666–67 (5th Cir.1981) (citing *United States v. Kordel*, 397 U.S. 1, 11, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970)). Thus, whether to stay a civil action pending resolution of a parallel criminal prosecution is not a matter of constitutional right, but, rather, one of court discretion, that should be exercised when the interests of justice so require. *Kordel*, 397 U.S. at 12 n. 27.A district court's discretionary authority to stay proceedings stems from its inherent authority to control the disposition of the cases on its own docket "with economy of time and effort for itself, for counsel, and for litigants."*Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936); *see also Alcala v. Texas Web County*, 625 F.Supp.2d 391, 396 (S.D.Tex.2009). However, "[i]t is the rule, rather than the exception that civil and criminal cases proceed together."*Alcala*, 625 F.Supp.2d at 397 (quoting *United*

*States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F.Supp.2d 758, 761 (W.D.Tex.2008)). In civil cases, there is a strong presumption in favor of discovery, and it is the party who moves for a stay that bears the burden of overcoming this presumption. *Id.* at 397–98;*see also Fresenius Medical*, 571 F.Supp.2d at 761; *United States v. Gieger Transfer Serv., Inc.*, 174 F.R.D. 382, 385 (S.D.Miss.1997).

***2** The Fifth Circuit has advised that in ruling on requests for stays of the civil side of parallel civil/criminal proceedings, "Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other. In some situations it may be appropriate to stay the civil proceeding. In others it may be preferable for the civil suit to proceed—unstayed."*Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir.1962) (internal citation omitted). However, the stay of a civil case should be entered only upon a showing of "special circumstances." *Alcala*, 625 F.Supp.2d at 398.District Courts in Texas have considered several factors in determining whether "special circumstances" warrant a stay, including: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest. *See, e.g., Alcala*, 625 F.Supp.2d at 398–99; *Akuna Matata Invs., Ltd. v. Texas Nom Ltd. P'ship*, 2008 WL 2781198, at * 2 (W.D.Tex.2008); *Librado v. M.S. Carriers, Inc.*, 2002 WL 31495988, * 1 (N.D.Tex.2002); *see also Trustees of Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.*, 886 F.Supp. 1134, 1139 (S.D.N.Y.1995) (citing *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 201–3 (Pollack, J.) (*"Parallel Proceedings"*)); *Volmar Distribs., Inc. v. The New York Post Co.*, 152 F.R.D. 36, 39 (S.D.N.Y.1993).

Defendant Russell argues that she has reason to believe there are ongoing criminal investigations against her based on the same facts and circumstances asserted in this lawsuit by the U.S. Department of Justice, Civil Rights Division, and the Travis County District Attorney's Office. Likewise, Defendant Green argues that there is an ongoing criminal investigation against him based on the same facts and circumstances asserted in this lawsuit by the U.S. Department of Justice, Civil Rights Division. Both defendants argue that they intend to invoke their Fifth Amendment right against self incrimination in their depositions in this case and that, by doing so, they face a choice between defending themselves in this lawsuit and the risk of incriminating themselves in the potential criminal cases against them. Defendants Russell and Green assert that they have reason to believe that one or more persons have either been interviewed by federal investigators or have been called to testify before the federal grand jury since the initiation of the discovery stay in April. However, neither Russell nor Green asserts that they are currently under indictment nor has either defendant offered evidence that indictments against them are imminent or even certain.

***3** Plaintiffs base their argument on the fact that no indictments have been issued against either Russell or Green and that the 90 day stay was more than sufficient to serve the defendants' interests. Specifically, plaintiffs argue that defendants Russell and Green have had more than enough time to determine their need to invoke the Fifth Amendment privilege during discovery in this case. Additionally, plaintiffs argue that there is a substantial risk of prejudice to them if an additional stay of unspecified duration is put into place because further delay in the case could lead to failed memories and lost evidence.

The first question to be resolved is the extent to which the issues in the potential criminal cases against Russell and Green overlap with the issues in the present case. The risk of self-incrimination is more likely if there is significant overlap between the issues in the civil and criminal cases.*Librado*, 2002 WL 31495988, at * 2;*see also Volmar Distribs.*, 152 F.R.D. at 39 (quoting *Parallel Proceedings*, 129 F.R.D. at 203). Both Russell and Green assert that the criminal investigations directed towards them are based on the same circumstances giving rise to this action. However, because there have been no indictments against either Russell or Green, there is no way to determine whether the issues in the criminal investigations do, in fact, substantially overlap with the issues in the present case. Even assuming that there is complete overlap of the issues, there is little danger in this case that the civil litigation is an effort by the government to evade any limits on criminal discovery or pressure the defendants to waive their Fifth Amendment rights since this case was brought by private plaintiffs and not a governmental agency. *See Alcala*, 625 F.Supp.2d at 402 ("the potential for prejudice to a criminal defense is diminished where private parties, and not the government, are the plaintiffs in the civil action") (citing *Citibank, N.A. v. Hakim*, 1993 WL 481335, at * 1 (S.D.N.Y.1993)); *see also Brock v. Tolkow*, 109 F.R.D.

116, 119 (E.D.N.Y.1985) ("A stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter, and is even more appropriate when both actions are brought by the government.") (internal citation omitted). Accordingly, this factor is neutral and does not weigh for or against granting defendants' requested stay.

The second factor to be considered is the status of the criminal case. "A stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct for two reasons: first, the likelihood that a defendant may make incriminating statements is greatest after an indictment has issued, and second, the prejudice to the plaintiffs in the civil case is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act considerations."*Librado,* 2002 WL 31495988, at * 2 (quoting *Trustee* s, 886 F.Supp. at 1139). Neither Russell nor Green asserts that they are currently under indictment nor has either defendant offered evidence that indictments against them are imminent or even certain. For these reasons, this factor weighs against granting a stay of discovery as to Russell and Green.

*4 Under the third factor, the Court must weigh the private interests of the plaintiffs in proceeding expeditiously against the prejudice that will be caused by the delay that will result from the stay. Plaintiffs rightfully assert that substantial delay can lead to the loss of evidence, loss of witnesses, and faded memories that may frustrate their ability to present an effective case and meet their burden of proof. This case has been pending for two years and has already been subject to a 90 day stay of discovery as to defendants Russell and Green. Any further delay, much less the indefinite delay sought by defendants, poses a substantial risk of prejudice to the Plaintiff. This factor, therefore, weighs heavily in favor of denying the stay.

The Court must also consider the private interests of and burden on defendants Russell and Green that would result if the stay is denied. It is well settled that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."*Baxter v. Palmigiano,* 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). However, whether or not to permit such an adverse inference in a civil case is left to the discretion of the district court.*Hinojosa v. Butler,* 547 F.3d 285, 291–92 (5th Cir.2008) (quoting *FDIC v. Fid. & Deposit Co.,* 45 F.3d 969, 977 (5th Cir.1995)). Accordingly, the Court may lessen the burden on defendants Russell and Green of proceeding with class certification discovery in this case while both defendants are under criminal investigation by limiting the adverse inference to be drawn from the exercise of their Fifth Amendment rights. Because discovery in this case is currently limited to those issues relevant to class certification, the Court will, at this time, limit any adverse inference arising from either defendant's decision to invoke his or her Fifth Amendment right to class certification issues. The decision of whether to extend any adverse inferences based on the currently scheduled depositions of defendants Russell and Green or any later depositions of or discovery from these defendants to the merits of the case is an open issue that will be determined by the Court upon the motion of either party.

Next, the Court must consider its own interests in managing its docket and disposing of cases expeditiously. This Court has already stayed discovery as to defendants Russell and Green for 90 days based on their fear of imminent criminal indictments. However, no indictments have been issued, and there is no evidence as to whether or when indictments might issue as to either defendant or when the criminal investigations against them will be resolved. This case has been pending for two years and a further stay of discovery directed towards defendants Russell and Green would result in an indefinite delay of the class certification and trial schedule, frustrating resolution if this case for an undefined period of time. Such a stay of indefinite duration is contrary to the Court's interest in moving its docket and ensuring the expeditious resolution of cases before it. *Alcala,* 625 F.Supp.2d at 407.In addition, stays of indefinite duration are frowned upon by the Fifth Circuit. S*ee McKnight v. Blanchard,* 667 F.2d 477, 479 (5th Cir.1982) (holding that a stay will be reversed when found to be immoderate or of an indefinite duration). Accordingly, this factor weighs in favor of denying defendants' motions to extend the stay of discovery directed towards them until the resolution of the criminal investigations.

*5 Finally, the Court must consider the public interest in deciding whether to stay discovery directed to Russell and Green. As previously discussed, staying discovery towards these two defendants will result in an indefinite delay in these proceedings. The Court notes that this case has garnered considerable public attention as a result of the serious allegations made against local public officials. Because of this and the fact that this case is a class action involving constitutional rights and alleging abuses by public officials,

the prompt resolution of this case would best serve the public interest.

**III.** ***Conclusion***

For the reasons set forth above, the Court hereby DENIES Defendant Lynda K. Russell's Second Opposed Motion for Protection Re: Staying Discovery Directed Toward Her (Dkt. No. 167) and Defendant Danny Green's Second Motion for Protection to Stay Discovery Directed Toward Him (Dkt. No. 169). The Court FURTHER ORDERS that any adverse inference arising from either defendant's decision to invoke his or her Fifth Amendment right against self incrimination will be limited at this time to class certification issues. The decision of whether to extend any adverse inferences based on the currently scheduled depositions of defendants Russell and Green or any later depositions of or discovery from these defendants to the merits of the case is an open issue that will be determined by the Court upon the motion of either party.

IT IS SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2010 WL 3057255

**End of Document**

2014 WL 4215378
Only the Westlaw citation is currently available.
United States District Court,
D. Idaho.

Jackie RAYMOND, individually as an heir, and as Personal Representative of the Estate of Barry Johnson, Plaintiff,
v.
Scott SLOAN; Payette County, a political subdivision of the State of Idaho; Charles Huff, Sheriff; and John Does 1–20, Defendants, and the Idaho State Police, Intervenor.

Civ. No. 1:13–423 WBS. | Signed Aug. 25, 2014.

***MEMORANDUM AND ORDER RE: MOTION TO DISMISS; MOTION TO AMEND; MOTION TO INTERVENE; MOTION TO STAY***

WILLIAM B. SHUBB, District Judge.

*1 Plaintiff Jackie Raymond brought this action against defendants Scott Sloan, Sheriff Charles Huff, and Payette County arising out of the death of her father in an automobile collision with Sloan. Defendants now move to dismiss plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and to stay discovery pending the determination of their motion; plaintiff moves to amend her complaint; and the Idaho State Police ("ISP") moves to intervene pursuant to Federal Rule of Civil Procedure 24(b).

**I. *Factual & Procedural History***

On October 18, 2011, Barry Johnson attempted to make a left turn from Highway 30 into the driveway of his residence near New Plymouth, Idaho. (Compl. ¶ 12 (Docket No. 1).) As he did so, Sloan, a deputy sheriff of Payette County, allegedly passed him in the left-hand lane at a speed of 115 miles per hour.(*Id.* ¶ 13.)Their cars collided. (*Id.* ¶ 16.)Johnson was ejected from the driver's seat of his vehicle and died as a result of his injuries. (*Id.*)

Plaintiff is Johnson's daughter and heir. (*Id.* ¶ 4.) She asserts two basic theories of relief. First, she brings a state-law claim for negligence against Sloan and Payette County, which she alleges is both vicariously liable for Sloan's conduct and independently liable for its failure to train, supervise, and control its employees. (*Id.* ¶¶ 6, 15, 17–19.)Second, she alleges that defendants conspired with officers of the ISP to cover up Sloan's misconduct and asserts that this conspiracy denied her of her constitutional right of access to the courts in violation of 42 U.S.C. §§ 1983 and 1985. (*Id.* ¶¶ 20–21.)

Defendants now move to dismiss plaintiff's Complaint for failure to state a claim upon which relief can be granted, (Docket No. 27), and to stay discovery pending resolution of the motion to dismiss, (Docket No. 28); plaintiff seeks leave to amend her Complaint, (Docket No. 31); and ISP moves to intervene in the action for the purpose of opposing plaintiff's motion to file an amended Complaint, (Docket No. 41).

**II. *Motion to Dismiss***

On a motion to dismiss, the court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff.*Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer,* 468 U.S. 183 (1984); *Cruz v. Beto,* 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a plaintiff needs to plead "only enough facts to state a claim to relief that is plausible on its face."*Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility."*Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Twombly,* 550 U.S. at 556–57).

**A. *42 U.S.C. § 1985***

*2 Subsection 1985(3) prohibits two or more persons from conspiring to deprive any person or class of persons of the equal protection of the laws. "To bring a cause of action successfully under § 1985(3), a plaintiff must demonstrate a deprivation of a right motivated by 'some racial, or otherwise class-based, invidiously discriminatory animus behind the conspirators' action.' " *RK Ventures, Inc. v. City of Seattle,* 307 F.3d 1045, 1056 (9th Cir.2002) (quoting *Sever v. Alaska Pulp Corp.,* 978 F.2d 1529, 1536 (9th Cir.1992)); *accord Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971). This requires "either that the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection." *Schultz v. Sundberg,* 759 F.2d 714, 718 (9th Cir.1985) (citing

*DeSantis v. Pac. Tel. & Tel. Co.,* 608 F.2d 327, 333 (9th Cir.1979)).

Here, plaintiff alleges only that defendants deprived her of her right of access to the courts in violation of the Fifth and Fourteenth Amendments. (*See* Compl. ¶¶ 20–21.) She has not alleged that she is a member of any protected class, let alone that defendants' conduct was motivated by a membership in such a class. *See RK Ventures,* 307 F.3d at 1056. Accordingly, the court must grant defendants' motion to dismiss plaintiff's § 1985 claim.

**B.** ***42 U.S.C. § 1983***

In relevant part, § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress ....

42 U.S.C. § 1983. While § 1983 is not itself a source of substantive rights, it provides a cause of action against any person who, under color of state law, deprives an individual of federal constitutional rights or limited federal statutory rights. *Id.; Graham v. Connor,* 490 U.S. 386, 393–94 (1989).

"The Supreme Court held long ago that the right of access to the courts is a fundamental right protected by the Constitution."*Delew v. Wagner,* 143 F.3d 1219, 1222 (9th Cir.1998) (citing *Chambers v. Balt. & Ohio R.R. Co.,* 207 U.S. 142, 148 (1907)). That right is "deni[ed] ... where a party engages in pre-filing actions which effectively cover[ ] up evidence and render[ ] any state court remedies ineffective."*Id.* (citing *Swekel v. City of River Rouge,* 119 F.3d 1259, 1262 (6th Cir.1997)).

However, because the right of access to the courts is "ancillary to the underlying claim" that a plaintiff seeks to litigate, a plaintiff must allege that the defendants' conduct actually prevented her from litigating that claim. *Christopher v. Harbury,* 536 U.S. 403, 415 (2002). A plaintiff "cannot merely guess that a state court remedy will be ineffective because of a defendant's actions."*Delew,* 143 F.3d at 1222 (quoting *Swekel,* 119 F.3d at 1264) (internal quotation marks omitted). Rather, she must show that she was "shut out of court" as a result of the defendants' conduct. *Christopher,* 536 U.S. at 415.

***3** Even if plaintiff's allegations were sufficient to establish that defendants had conspired to cover up Sloan's misconduct, (*see* Compl. ¶ 20), she has not alleged that "defendants' alleged cover-up caused h[er] to lose or inadequately settle h[er] prior meritorious action."*Ejigu v. City of Los Angeles,* 286 Fed. App'x 977, 978 (9th Cir.2008). In fact, aside from her bare allegation that defendants' conduct "significantly impaired" her ability to seek legal redress for her injuries, (Compl.¶ 21), plaintiff has not alleged any facts establishing that she is currently unable to litigate her state-law negligence claim.

At this stage in the litigation, it is premature to determine whether defendants' alleged cover-up will result in the defeat of her negligence claim. Instead of speculating upon the fate of that claim, the court will instead dismiss plaintiff's § 1983 claim without prejudice. *See Delew,* 143 F.3d at 1223 (holding that when a plaintiff alleges a cognizable but unripe access-to-courts claim, the proper course of action is to dismiss without prejudice). If plaintiff's efforts to litigate that claim in state court prove unsuccessful, she is free to file a new access-to-courts claim in either state or federal court. [1]

1 Because an access-to-courts claim does not accrue until the entry of judgment in the underlying claim, the statute of limitations will not run on that claim until after plaintiff has had the opportunity to pursue her negligence claim in Idaho state court. *See Morales v. City of Los Angeles,* 214 F.3d 1151, 1154 (9th Cir.2000) (holding that the plaintiffs' access-to-courts claim "accrued when the alleged police misconduct resulted in judgments being entered against them"). The court's dismissal of this claim will therefore not prejudice plaintiff from bringing an access-to-courts claim if and when it ripens.

**C.** ***Supplemental Jurisdiction***

28 U.S.C. § 1367 authorizes federal courts to exercise supplemental jurisdiction over state-law claims that are sufficiently related to those claims over which they have original jurisdiction. 28 U.S.C. § 1367(a); *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 725 (1966). A district court "may decline to exercise supplemental jurisdiction over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction."28 U.S.C. § 1367(c)(3); *see*

*also Acri v. Varian Assocs., Inc.,* 114 F.3d 999, 1000 (9th Cir.1997) ("[A] federal district court with power to hear state law claims has discretion to keep, or decline to keep, them under the conditions set out in § 1367(c).").

Factors courts consider in deciding whether to dismiss supplemental state-law claims include judicial economy, convenience, fairness, and comity. *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156, 172–73 (1997)."[I]n the usual case in which federal law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state law claims."*Reynolds v. County of San Diego,* 84 F.3d 1162, 1171 (9th Cir.1996), *overruled on other grounds* by *Acri,* 114 F.3d at 1000.

Because the court will dismiss plaintiff's §§ 1983 and 1985 claims, only her state-law negligence claim remains. Plaintiff does not identify any extraordinary or unusual circumstances suggesting that the court should retain jurisdiction over her state-law claim in the absence of any federal claim. And because plaintiff's federal-law claims essentially assert that she was deprived of her ability to seek relief available under state law, comity principles suggest that the state courts of Idaho should be allowed to hear her negligence claim in the first instance. *Cf. Delew,* 143 F.3d at 1223. The court therefore declines to exercise supplemental jurisdiction over plaintiff's state-law negligence claim pursuant to 28 U.S.C. § 1367(c)(3).

**III.** ***Motion to Intervene***

***4** Since ISP has moved to intervene for the limited purpose of joining in defendants' motion to dismiss and opposing plaintiff's motion to amend, the court must resolve that motion prior to determining whether amendment is proper. Rule 24(b) provides that, on a timely motion, the court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact."Fed.R.Civ.P. 24(b)(1)(B); *see Perry v. Proposition 8 Official Proponents,* 587 F.3d 947, 955 (9th Cir.2009) (citation omitted).Rule 24(b) requires the court to consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed.R.Civ.P. 24(b)(3)."The court may also consider other factors in the exercise of its discretion, including 'the nature and extent of the intervenors' interest and 'whether the intervenors' interests are adequately represented by other parties.' " *Perry,* 587 F.3d at 955 (quoting *Spangler v. Pasadena City Bd. of Educ.,* 552 F.3d 1326, 1329 (9th Cir.1977)).

Here, plaintiff alleges that defendants conspired with ISP and its officers to cover up and manipulate the investigation of Sloan's wrongdoing; as a result, any defense that ISP might allege shares common questions of fact with those defendants assert and thereby satisfies Rule 24(b). Additionally, because ISP seeks to intervene for the limited purpose of supporting dismissal and opposing amendment, has already submitted briefs on these issues, and has already been heard at the hearing, there is little risk that its involvement in the case will further delay the proceedings or prejudice plaintiff. Accordingly, the court will grant ISP's motion to intervene for the limited purpose of supporting dismissal and opposing amendment.

**IV.** ***Motion to Amend***

Plaintiff seeks leave to amend and has filed a proposed amended complaint ("PAC"). (Docket No. 31–1.)That complaint asserts five causes of action: (1) a state-law negligence claim; (2) a § 1985 claim; (3) a § 1983 claim alleging that defendants' cover-up denied plaintiff the right to access the courts; (4) a § 1983 claim alleging that defendants' conduct denied plaintiff substantive due process by terminating her relationship with her father; and (5) a § 1983 claim alleging that defendants denied plaintiff equal protection of the laws by interfering with the prosecution of Sloan.(*Id.*) In addition, plaintiff seeks to join ISP and four ISP officers as defendants. (*Id.*)

A motion to amend is generally subject to Rule 15(a), which provides that "[t]he court should freely give leave [to amend] when justice so requires."Fed.R.Civ.P. 15(a)(2)."However, once a scheduling order has been entered pursuant to Rule 16(b), the more restrictive provisions of that subsection requiring a showing of 'good cause' for failing to amend prior to the deadline in that order apply."*Robinson v. Twin Falls Highway Dist.,* 233 F.R.D. 670, 672 (D.Idaho 2006) (Winmill, J.); *accord Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 609 (9th Cir.1992). "Unlike Rule 15(a)'s liberal amendment policy, which focuses on the bad faith of the party seeking an amendment and the prejudice to the opposing party, the 'good cause' standard set forth in Rule 16 primarily focuses on the diligence of the party requesting the amendment." *Sadid v. Vailas,* 943 F.Supp.2d 1125, 1138 (D.Idaho.2013) (Winmill, J.) (citing *Johnson,* 975 F.2d at 607).

***5** Here, plaintiff has not made the required showing of diligence. On February 18, 2014, plaintiff filed a Notice of

Tort Claim against ISP and four ISP officers alleging that those officers were involved in a conspiracy to cover up Sloan's misconduct. (*See* Hall Aff. Ex. C (Docket No. 39–1).) In that notice, plaintiff indicated that she learned of the identity of those ISP officers on October 31, 2013. (*Id.*) The court then issued its scheduling order on February 28, 2014, indicating that the parties would have until April 14, 2014 to amend their pleadings. (Docket No. 20.)Yet plaintiff did not seek to leave to amend until July 1, 2014, nearly three months after that deadline had elapsed. (Docket No. 31 .)Because plaintiff evidently knew of the basis of any claims she might assert against ISP no later than February 18, 2014, her failure to do so before the deadline for amended pleadings shows that she was not diligent. *See Robinson,* 233 F.R.D. at 673 ("Knowing of the facts forming the basis for the proposed amendment prior to the deadline for amending precludes a finding of due diligence.").

Plaintiff's proposed amendments would also result in prejudice to ISP, which is an additional reason to deny leave to amend. *See id*. at 674 ("While a finding of prejudice is not required under Rule 16(b), it is an added consideration ...."); *Johnson,* 975 F.2d at 609 (noting that the "existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion" for leave to amend). In particular, plaintiff voluntarily dismissed ISP from this action on February 14, 2014; as a result, ISP has not conducted any discovery and has not anticipated having to defend this action. (*See*Docket No. 18.)If the court permitted plaintiff to join ISP and its officers at this point, ISP would have approximately two months to produce an expert report and approximately five months to conduct discovery. (*See*Docket No. 20.)Requiring ISP to complete discovery on an expedited timetable at this point in the case would prejudice its defense of this case—particularly if the evidence has become stale or unavailable in the six months since plaintiff previously dismissed it from this action—and militates against granting leave to amend.

Although plaintiff's counsel conceded at oral argument that plaintiff could not show good cause to modify the scheduling order under Rule 16, he nonetheless argued that plaintiff should be permitted to amend her complaint to cure those claims that she asserted in her initial complaint. [2] As courts in the Ninth Circuit have repeatedly emphasized, it is generally appropriate to permit a plaintiff at least "one opportunity to amend, unless amendment would be futile."*In re Atlas Mining Co. Sec. Litig.,* 670 F.Supp.2d 1128, 1135 (D.Idaho 2009) (Lodge, J.) (citing *Vess v. Ciba–Geigy Corp., USA,* 317 F.3d 1097, 1108 (9th Cir.2003)); *see also Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma County,* 708 F.3d 1109, 1118 (9th Cir.2013) ("As a general rule, dismissal without leave to amend is improper unless it is clear ... that the complaint could not be saved by any amendment ."(citation, internal quotation marks, and alteration omitted)). However, this rule does not require the court to permit plaintiffs to assert new claims or join new parties. *See, e.g., Morongo Band of Mission Indians v. Rose,* 893 F.2d 1074, 1079 (9th Cir.1990) (holding that denial of leave to include new claims was appropriate because the "new claims set forth in the amended complaint would have greatly altered the nature of the litigation"); *Stearns v. Select Comfort Retail Corp.,* 763 F.Supp.2d 1128, 1153 (N.D.Cal.2010) (granting leave to amend after dismissal but requiring plaintiffs to seek leave to add new claims).

2 While Rule 16 does not expressly differentiate between amendments to pleading upon a party's motion and amendments to pleading after dismissal, several courts have permitted limited amendments to cure deficiencies in dismissed pleadings even when these amendments otherwise would not have satisfied Rule 16's "good cause" requirement. *See, e.g., Inge v. Rock Fin. Corp.,* 281 F.3d 613, 626 (6th Cir.2002); *M.G. ex rel Goodwin v. County of Contra Costa,* Civ. No. 11–4853 WHA, 2013 WL 706801, at *2 (N.D.Cal. Feb. 26, 2013) (granting leave to amend complaint to replace two Doe defendants with identified sheriff's deputies, even though the "[p]laintiff's counsel admit[ted] that good cause for the late amendment is absent").

***6** As plaintiff acknowledged at oral argument, her efforts to amend her § 1985 claim are futile: that statute requires a showing of some racial or other class-based animus, *see RK Ventures,* 307 F.3d at 1056, and plaintiff has not alleged—and appears unable to allege—that any cover-up was motivated by her membership in a protected class. Plaintiff's counsel conceded at oral argument that she had not alleged that any purported conspiracy was so motivated. The court therefore dismisses this claim with prejudice and without leave to amend.

Likewise, plaintiff's efforts to amend her access-tocourts claim are futile. While her proposed amended complaint adds considerable detail to her allegations of a cover-up, those new facts do not resolve the central flaw with her claim: she has not alleged that defendants' actions have resulted in the defeat of her state-law negligence claim and cannot do so until that claim reaches judgment. *See Delew,* 143 F.3d at 1223. Granting plaintiff leave to amend that claim would not cure this defect and is therefore futile. *See San Diego*

*Cnty. Gun Rights Comm. v. Reno,* 926 F.Supp. 1415, 1425 (S.D.Cal.1995) (denying leave to amend claims challenging constitutionality of criminal statute when plaintiffs conceded that they were not currently facing prosecution under that statute).

Plaintiff also seeks leave to assert a new equal protection claim in which she alleges that defendants denied her equal protection of the laws by interfering with Sloan's prosecution. (*See*PAC ¶ 25.) But as the Supreme Court has emphasized, a claim of this nature is unavailing because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."*Linda R.S. v. Richard D.,* 410 U.S. 614, 619 (1973). And even if it were not futile, this claim appears nowhere in plaintiff's initial Complaint, and the court need not permit her to assert it now. *See Rose,* 893 F.2d at 1079.

Finally, plaintiff seeks leave to assert a substantive due process claim alleging that defendants' misconduct terminated her relationship with her father and thereby denied her of a constitutionally protected liberty interest. (*See*PAC ¶ 26; Compl. ¶ 20.) The parties dispute whether plaintiff should be allowed to amend her complaint to include this claim, in large part because they disagree about whether plaintiff attempted to assert a due process claim in her initial Complaint. Both sides agree that this dispute turns upon how the court construes paragraph 20 of the Complaint, which reads:

> On information and belief, the defendants, and each of them or some of them, during ISP's investigation of the misconduct of defendant Sloan as alleged above, conspired and attempted to, and did, cover up such misconduct and/or unduly influence the investigation, evidence, and witnesses accordingly, in order to shield defendants Sloan, Huff, and Payette County from liability and responsibility for their aforesaid misconduct, *thereby depriving Plaintiffs of their constitutional right to due process* and access to the courts, pursuant to official policies, practices, and customs of ISP and the Payette County Sheriff's department, in violation of the fifth and fourteenth amendments to the United States Constitution and 42 U.S.C. §§ 1983 and 1985.

*7 (Compl. ¶ 20 (emphasis added).)

This paragraph is not a model of clarity, and it leaves open the question of whether plaintiff's allegations that she was denied due process are a freestanding claim or merely part of her access-to-courts claim. At oral argument, plaintiff's counsel vigorously argued that plaintiff intended to assert a separate due process claim alleging that Sloan's reckless or intentional conduct deprived plaintiff of a constitutionally protected interest. In light of her allegation that Sloan collided with her father's car while driving 115 miles an hour, the court cannot conclude that this claim would be futile. *See generally County of Sacramento v. Lewis,* 523 U.S. 833, 845–55 (1998) (describing standards applicable to substantive due process claims).

In short, while plaintiff has not shown good cause to amend her complaint under Rule 16, the court may nonetheless permit plaintiff to cure deficiencies in her initial Complaint notwithstanding her lack of diligence. *See Inge,* 281 F.3d at 626; *M.G.,* 2013 WL 706801, at *2. Accordingly, the court will permit plaintiff to amend her complaint to re-assert one or both of two claims: (1) a state-law negligence claim; and (2) a claim that defendants' conduct deprived her of substantive due process. The court will not permit plaintiff to plead any other claim or to join any additional defendant, including ISP or any of its officers.

**V. *Motion to Stay***

Defendants have moved to stay discovery pending the resolution of their motion to dismiss. Their motions to dismiss have now been resolved by this Order. Admittedly there may be more motions in response to plaintiff's amended complaint, but the court sees no value in staying discovery any further. A district court "has broad discovery to stay discovery in a case while a dispositive motion is pending."*Orchid Biosciences, Inc. v. St. Louis Univ.,* 198 F.R.D. 670, 672 (S.D.Cal.2001) (citing *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.,* 557 F.2d 1280 (9th Cir.1977)). However, discovery stays are typically disfavored because they "may interfere with judicial efficiency and cause unnecessary litigation in the future."*Qwest Commc'ns Corp. v. Herakles, LLC,* Civ. No. 2:07–393 MCE KJM, 2007 WL 2288299, at *2 (E.D.Cal. Aug. 8, 2007). As a result, a party seeking a discovery stay bears a "heavy burden" and must make a "strong showing" in favor of a discovery stay. *Skellerup Indus. Ltd. v. City of Los*

*Angeles,* 163 F.R.D. 598, 600 (C.D.Cal.1995) (citations and internal quotation marks omitted).

Defendants represent that "[t]his [m]otion is made to save time and expense should the [c]ourt determine that there are no viable allegations sufficient to create federal court jurisdiction."(Docket No. 28.)As a general rule, however, the pendency of a motion to dismiss alone is not enough to merit a discovery stay. *See, e.g., Skellerup,* 163 F.R.D. at 600–01; *Gray v. First Winthrop Corp.,* 133 F.R.D. 39, 40 (N.D.Cal.1990). Nor do defendants explain how a discovery stay will save time and expense; on the contrary, it appears that a discovery stay will simply prolong these proceedings by forcing the parties to wait until the resolution of an additional motion to dismiss to begin discovery. Defendants have therefore not made a "strong showing" that a discovery stay is warranted, *Skellerup,* 163 F.3d at 600, and the court will deny its motion for a discovery stay.

*8 IT IS THEREFORE ORDERED that defendants' motion to dismiss be, and the same hereby is, GRANTED. Plaintiff's claim under 42 U.S.C. § 1985 is DISMISSED WITH PREJUDICE. Plaintiff's claims under 42 U.S .C. § 1983 and her state-law claim for negligence are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that:

(1) the Idaho State Police's motion to intervene be, and the same hereby is, GRANTED;

(2) plaintiff's motion for leave to amend be, and the same hereby is, is GRANTED IN PART on the terms set forth in this Order; and

(3) defendants' motion for a discovery stay be, and the same hereby is, DENIED.

Plaintiff has twenty days from the date this Order is signed to file an amended Complaint, if she can do so consistent with this Order.

**All Citations**

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United States District Court, D. Montana,
Missoula Division.

Michael E. SPREADBURY, Plaintiff,
v.
BITTERROOT PUBLIC LIBRARY, City of Hamilton, Lee Enterprises, Inc., and Boone Karlberg, P.C., Defendants.

No. CV 11–64–M–DWM–JCL. | May 25, 2011.

**Attorneys and Law Firms**

Michael E. Spreadbury, Hamilton, MT, pro se.

Natasha Prinzing Jones, Thomas J. Leonard, William L. Crowley, Boone Karlberg, Jeffrey Brandon Smith, Garlington Lohn & Robinson, Missoula, MT, for Defendants.

**ORDER**

JEREMIAH C. LYNCH, United States Magistrate Judge.

*1 Plaintiff Michael E. Spreadbury has filed various motions in this action. The Court will address several of those motions in this Order.

***I. Motion to Proceed In Forma Pauperis***

Spreadbury filed a Motion to Proceed In Forma Pauperis. Spreadbury submitted a statement of his financial condition as required by 28 U.S.C. § 1915(a). Because it appears Spreadbury lacks sufficient funds to prosecute this action IT IS HEREBY ORDERED that his Motion to Proceed In Forma Pauperis is GRANTED.

***II. Motion for Appointment of Counsel***

Spreadbury moves for appointment of counsel to represent him in this action. In support of his motion Spreadbury states he is disabled, that he has been unable to secure gainful employment, and he has not been able to find legal counsel to represent him in this action. He contends his legal claims have merit, and that he is entitled to legal assistance as a matter of right. [1]

[1] Spreadbury cites to Fed.R.Civ.P. 44(a) in support of his motion for appointment of counsel. Rule 44(a), however, establishes what constitutes evidence of a domestic or foreign official record, and it does not provide any right to the appointment of counsel.

A plaintiff does not have a right to the appointment of counsel in a civil action. *Palmer v. Valdez,* 560 F.3d 965, 970 (9th Cir.2009). Although the Court has discretionary authority to appoint counsel to represent an indigent litigant under 28 U.S.C. § 1915(e)(1) (*see Palmer,* 560 F.3d at 970), such appointment can occur only under "exceptional circumstances." *Terrell v. Brewer,* 935 F.2d 1015, 1017 (9th Cir.1991).*Palmer,* 560 F.3d at 970.

> A finding of exceptional circumstances requires an evaluation of both 'the likelihood of success on the merits and the ability of the [litigant] to articulate his claims pro se in light of the complexity of the legal issues involved.'Neither of these factors is dispositive and both must be viewed together before reaching a decision.

*Id.* (citing *Wilborn v. Escalderon,* 789 F.2d 1328, 1331 (9th Cir.1986) (citations omitted)).*See also Palmer,* 560 F.3d at 970.

At this early stage of this lawsuit there is no basis in the record on which the Court could conclude that Spreadbury has presented exceptional circumstances warranting appointment of counsel. Although Spreadbury asserts he is disabled, he has not established that he will be unable to sufficiently articulate his claims. He also has not demonstrated the requisite likelihood of success on the merits of his claims.

Accordingly, IT IS HEREBY ORDERED that Spreadbury's Motion for Appointment of Counsel is DENIED.

***III. Motion to Appoint Lead Defense Counsel***

Jeff Smith, an attorney with the firm of Garlington, Lohn & Robinson, is counsel for Defendant Lee Enterprises, Inc. in this matter. All other Defendants named in this action are represented by Natasha Prinzing Jones, Thomas Leonard, and William Crowley, all of whom are attorneys at the firm of Boone Karlberg, P.C.

Spreadbury moves for an order consolidating Defendants' legal representation, and appointing Jeff Smith to serve as lead counsel for all Defendants named in this action. Spreadbury asserts the appointment is warranted due to the nature of his claims advanced in this action, and based on his

perception that it would be inequitable for Defendants to be represented by multiple attorneys. Spreadbury also relies on rules applicable to the appointment of counsel for parties in class action lawsuits. *See*Fed.R.Civ.P. 23(g).

*2 Spreadbury's motion wholly lacks merit. This matter is not a class action lawsuit, and is not governed by Rule 23. There exists no legal authority, and no basis in the record for the Court to designate and appoint a single attorney to serve as counsel for all Defendants in this action. Parties to an action are at liberty to retain counsel of their choice. THEREFORE, IT IS ORDERED that Spreadbury's Motion to Appoint Lead Defense Counsel is DENIED.

***IV. Motion to Remand Pendent State Claims***

On April 19, 2011, Defendants Bitterroot Public Library and City of Hamilton removed this action to this Court from the Montana Twenty–First Judicial District Court, Ravalli County. Defendants' Notice of Removal was filed pursuant to 28 U.S.C. § 1441(a), and they assert this Court has federal question jurisdiction over this action as provided by 28 U.S.C. § 1331 based on the federal claims Spreadbury advances in this case.

In addition to his claims pled under federal law, Spreadbury advances numerous claims against Defendants that are cognizable under Montana law. With respect to those claims, federal law grants this Court "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."28 U.S.C. § 1367(a).

Under the circumstances of this case, the Court finds that all of Spreadbury's state law claims advanced in this case are sufficiently related to his federal claims so as to "form part of the same case or controversy" within the contemplation of 28 U.S.C. § 1367(a). Therefore, the Court has supplemental jurisdiction over all of Spreadbury's state law claims.

Spreadbury moves, pursuant to 28 U.S.C. § 1441(c), for an order remanding his claims for intentional and negligent infliction of emotional distress that are pled under Montana law. Spreadbury presumably intends to leave all of his other remaining state law claims for resolution by this Court. For the reasons discussed, Spreadbury's motion for remand is denied.

The Court has discretionary authority to decline to exercise supplemental jurisdiction over the state law claims under the conditions set forth in 28 U.S.C. § 1367(c), or to remand those claims as provided under 28 U.S.C. § 1441(c). A district court may decline to exercise supplemental jurisdiction for the following reasons:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c)(1)-(4). Further, consistent with Section 1367(c)(2), the court also "may remand all matters in which State law predominates."28 U.S.C. § 1441(c).

*3 A court's retention of supplemental jurisdiction is discretionary, and the court may decline to exercise jurisdiction over state law claims "[d]epending on a host of factors including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims."*City of Chicago v. International College of Surgeons,* 522 U.S. 156, 173 (1997).

Spreadbury has not identified any valid reason justifying a remand of his emotional distress claims. Instead, he incorrectly asserts the Court does not have jurisdiction over his emotional distress claims contrary to 28 U.S.C. § 1367(a) as discussed above. He has otherwise failed to identify any circumstances under 28 U.S.C. § 1367(c) which would prompt the Court to decline to exercise jurisdiction over his emotional distress claims, and he has failed to establish grounds for remand under 28 U.S.C. § 1441(c). Therefore, under the circumstances of this case, the Court does not deem it appropriate to decline to exercise supplemental jurisdiction over Spreadbury's emotional distress claims, or to remand those claims. THEREFORE, IT IS HEREBY ORDERED that Spreadbury's Motion to Remand Pendant State Claims is DENIED.

***V. Motion to Stay Discovery Pending Court Action***

On May 13, 2011, Spreadbury filed a motion requesting partial summary judgment against Defendants with respect to some of the claims set forth in his Second Amended Complaint. Spreadbury's motion also challenges the qualified immunity which some of the Defendants assert, or may assert in defense of Spreadbury's claims.

On May 19, 2011, Spreadbury moved to stay discovery in this matter pending the Court's resolution of his motion for partial summary judgment and the related issues of qualified immunity. He contends he is entitled to a stay of discovery under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

A defendant's eligibility for qualified immunity, if granted, affords the defendant "immunity from suit rather than a mere defense to liability [.]"*Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). Consequently, if a defendant is eligible for qualified immunity, then the defendant should not be subjected to the costs of trial, or burdens of discovery. "Until this threshold immunity question is resolved, discovery should not be allowed[,]" so as to avoid the excessive disruption which unnecessary litigation could cause to a government official's duties. *Harlow,* 457 U.S. at 818.Thus, under *Harlow* a stay of discovery is for the benefit of a defendant who may be entitled to qualified immunity, not for the benefit of a plaintiff attempting to defeat qualified immunity.

Based on the foregoing, Spreadbury has failed to establish any good cause for a stay of discovery pending resolution of his motion for partial summary judgment. THEREFORE, IT IS ORDERED Spreadbury's motion to stay discovery is DENIED.

**All Citations**

Not Reported in F.Supp.2d, 2011 WL 2117563

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2015 WL 4170140
Only the Westlaw citation is currently available.
United States District Court,
D. Idaho.

Heather S. TIMOTHY, an individual, Plaintiff,
v.
ONEIDA COUNTY, a political subdivision of the state of Idaho; Dustin W. Smith, individually and in his capacity as Prosecuting Attorney for Oneida County, Idaho; Shellee Daniels, Dale F. Tubbs and Max C. Firth, individually and in their capacities as Oneida County Commissioners, Defendants.

No. 4:14–cv–00362–
BLW. | Signed July 9, 2015.

**Attorneys and Law Firms**

Stephen J. Muhonen, Carol Tippi Jarman, Richard A Hearn, Racine Olson Nye Budge & Bailey, Pocatello, ID, for Plaintiff.

Bruce J. Castleton, Tyler D. Williams, Naylor and Hales, Boise, ID, for Defendants.

**MEMORANDUM DECISION AND ORDER**

B. LYNN WINMILL, Chief Judge.

*1 Before the Court is Defendants' Motion to Quash Subpoena and Motion for Protective Order (Dkt.27). Pursuant to the Court's discovery dispute procedure outlined in the Case Management Order, the parties contacted Court staff in attempt to mediate a pending discovery dispute. Unable to resolve the issues, Defendants move to stay discovery and quash several subpoenas. For the reasons set forth below, the Court will grant Defendant's motion in part and deny it in part.

**BACKGROUND**

Plaintiff Heather Timothy was fired from her position as legal secretary to Oneida County Prosecutor Dustin Smith after she reported Smith for allegedly misappropriating public funds. In August 2014, Timothy filed this lawsuit. The original amended complaint named Oneida County, Smith, and County Commissioners Shellee Daniels, Dale Tubbs, and Max Firth as defendants and asserted claims for (1) injunctive and declaratory relief for First and Fourteenth Amendment violations, (2) retaliatory discharge in violation of the First Amendment, (3) denial of due process in violation of 42 U.S.C. § 1983, (4) wrongful termination in violation of state law, (5) negligent infliction of emotional distress, (6) termination of private employment in violation of public policy, (7) intention infliction of emotional distress, and (8) conspiracy claims against the Commissioner defendants tied to the First Amendment claim and the Fourteenth Amendment due process claim.

Defendants moved to dismiss the amended complaint, which the Court partially granted. Specifically, the Court dismissed, *with leave to amend,* (1) the First Amendment claim as to the Commissioner defendants (Count II), (2) the property-interest claim alleged within the due process claim (Count III) as to the Commissioner defendants, (3) the claim for negligent infliction of emotional distress as to the Commission defendants (Count V), (4) the claim for intentional infliction of emotional distress, alleged against Smith only (Count VII), and (5) the conspiracy claims associated with First Amendment and the Fourteenth Amendment property-interest claims. The Court dismissed, *without leave to amend,* the liberty-interest claim encompassed within the due process claim (Count III), and the accompanying conspiracy claim.

Timothy has filed a Second Amended Complaint (Dkt.25), re-alleging all those claims dismissed with leave to amend. In addition, Timothy has filed a motion to reconsider the Court's decision denying Timothy the opportunity to amend her liberty-interest and accompanying conspiracy claim. Defendants have moved to dismiss the Second Amended Complaint and have opposed the motion to reconsider.

This discovery dispute arose when Timothy notified defense counsel, Bruce Castleton, that she intended to serve third party subpoenas directed to: (1) Lt. Kyle Fullmer, Idaho State Police; (2) private attorney Mark L. Heideman, who served as a special prosecutor in connection with an investigation into Defendant Smith; (3) Sheriff Jeffery Semrad, Oneida County Sheriff's Office; and (4) Bruce J. Castleton. Each subpoena directs the recipient to appear for a deposition and requests production of documentation related to various communications and the appointment of a special prosecutor in connection with the investigation of Dustin Smith. *Castleton Decl.* ¶ 2, Exs. A–D.

*2 Mr. Castleton contacted Mr. Hearn and objected to the subpoenas on the grounds that "most if not all of what they seek is moot in light of the Court's recent order partially dismissing the claims against Defendants, including relevant here the liberty-interest and conspiracy claims against Defendants...."*Defs' Opening Br.*, p. 2, Dkt. 27–1. Mr. Castleton also objected to the subpoena served against him on the grounds that his deposition would raise attorney-client privilege issues. Mr. Hearn, in response, indicated that his client, Timothy, would be proceeding with the subpoenas and would not agree to a stay of discovery.

Unable to informally resolve these issues, Defendants now file a motion to quash the subpoenas and a motion for protective order staying all discovery pending resolution of Timothy's motion to reconsider and Defendants' recently-filed motion to dismiss the Second Amended Complaint.

## ANALYSIS

**1. Motion for Protective Order to Stay Discovery**

Federal Rule of Civil Procedure 26(c) governs the granting of a protective order. A party seeking such an order must show "good cause." *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D.Ca.1990). A party seeking to stay discovery carries an even heavier burden and must make a "strong showing" for why discovery should be denied.*Id.* (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975))."The moving party must show a particular and specific need for the protective order, as opposed to making stereotyped or conclusory statements."*Id.* (citing Wright & Miller, Federal Practice and Procedure, § 2035).

In this case, Defendants have not made a "strong showing" justifying a stay of *all* discovery; rather, Defendant merely urge that discovery should be stayed pending Court's ruling on its motion to dismiss. Defendants have done no more than to argue in conclusory fashion that its motion to dismiss will succeed. This "[i]dle speculation does not satisfy Rule 26(c)'s good cause requirement. Such general arguments could be said to apply to any reasonably large civil litigation. If this court were to adopt Defendants' reasoning, it would undercut the Federal Rules' liberal discovery provisions. Had the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.P. 12(b)(6) would stay discovery, the Rules would contain a provision for that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation. *Gray,* 133 F.R.D. at 40.

Defendants, however, argue that the information Timothy seeks through the third-party subpoenas only relates to Timothy's dismissed liberty-interest claim. Timothy has subpoenaed Sheriff Semrad, to whom she reported Smith's alleged misappropriation of public funds. Timothy alleges that she was terminated, at least in part, "because she was perceived to have been communicating negative information about Prosecutor Smith to the Sheriff. *Sec. Am. Compl.* ¶ 38, Dkt. 25. Given his involvement in the events that allegedly led to Timothy's termination, he would appear to be a key witness, and not just have information relating to the dismissed liberty-interest claim.

*3 Likewise, Mark Heideman, as the special prosecutor assigned to investigate Smith, and Lt. Kyle Fuller of the Idaho State Police, who also investigated Smith's alleged misappropriation of funds, could have information that might bear on the various other claims Timothy has alleged apart from the liberty-interest claim. For example, they might have information that might bear on Timothy's allegations that the Commissioner defendants conspired with Smith in denying Timothy her constitutional rights under the First and Fourteenth Amendments (two claims that currently remain in the case). In addition, after Lt. Fulmer's investigation of Smith had concluded, on January 30, 2014, Lt. Fulmer interviewed Timothy about criminal investigation into Smith. *Sec. Am. Compl.* ¶ 74, Dkt. 25. Four days later, on February 4, Timothy received a Notice of Pending Personnel Action, which indicated she may have been involved in acts or omissions that could subject her to discipline. *Id.* ¶ 75. Given the proximity between these two events, it is possible that Lt. Fulmer may have information relating to the Smith's decision to issue the Notice. These are just a couple examples of relevant information that the subpoenaed witnesses may possess.

Finally, the Court also believes that Mr. Castleton could have information relevant to claims apart from the liberty-interest claim, but the proposed deposition of Mr. Castleton, as counsel for the defense, raises distinct issues, which the Court will address below.

**2. Castleton Subpoena**

The U.S. Supreme Court has held that discovery of facts possessed by an attorney is proper where the facts are relevant, non-privileged, and essential to preparation of one's case. *Hickman v. Taylor,* 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Similarly, the Ninth Circuit has held

that blanket assertions of privilege are extremely disfavored. *U.S. v. Martin,* 278 F.3d 988, 1000 (9th Cir.2002). And when a party challenges discovery of information from counsel based on privilege, the challenging party has the burden of establishing the relationship and privileged nature of the communication.*U.S. v. Bauer,* 132 F.3d 504, 507 (9th Cir.1997).

But "[t]he strong presumption against a blanket assertion of privilege while normally appropriate and necessary, must be abandoned where a party seeks to depose trial counsel."*Melaleuca, Inc. v. Bartholomew,* No. 4:12–cv–00216–BLW, 2012 WL 3544738, *2 (D.Idaho August 16, 2012) (citing *Shelton v. Am. Motors Corp.,* 805 F.2d 1323, 1327–28 (8th Cir.1986)). Instead, because Timothy seeks to depose trial counsel, she must establish that "the information sought (1) cannot be obtained through other means; (2) is relevant and not covered by privilege or the work-product doctrine; and (3) is necessary in preparing their case."*Id.* (citing *Shelton,* 805 F.2d at 1327–28).

"It is rare for this standard to be satisfied,"*Stewart Title Guar. Co. v. Credit Suisse,* No. 1:11–cv–227–BLW, 2013 WL 4763949, *1 (Sept. 4, 2013), and, at least at this juncture, this case is no different. Indeed, this issue can be dispensed with under the first factor. Timothy has made no effort to show that the information she seeks from Mr. Castleton cannot be obtained through other means. Discovery has not even begun in this case. It is not only possible, but likely, that the other individuals Timothy intends to depose hold the information Timothy seeks from Mr. Castleton. The Court therefore finds that Timothy has failed to establish that any information she seeks from Mr. Castleton cannot be obtained through some other discovery.

*4 Accordingly, at this point, the Court will quash any subpoena issued for Mr. Castl this case. P erhaps, at some later time, Timothy will be able to meet standard. That time, however, is not now.

## ORDER

IT IS THEREFORE ORDERED that Defendants' Motion to Quash Motion for Protective Order (Dkt.27) is GRANTED in part and DENIED in part. discovery is denied, but Defendants' request to quash Mr. Castleton's subpoena is granted.

### All Citations

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2015 WL 5257132
Only the Westlaw citation is currently available.
United States District Court,
D. Idaho.

United States of America, United States of America ex. rel., Dr. Jeffrey Jacobs, Plaintiff,
v.
CDS, P.A. d/b/a Pocatello Women Health Clinic; Pocatello Hospital, LLC d/b/a/ Portneuf Medical Center, LLC, a Delaware limited liability Company; LHP Pocatello, LLC, a Delaware limited liability company, Defendants.

Case No. 4:14-cv-00301-BLW | Signed 09/03/2015

## MEMORANDUM DECISION AND ORDER

B. LYNN WINMILL, Chief Judge

## INTRODUCTION

*1 Before the Court is Defendants' CDS, P.A. d/b/a Pocatello Women's Health Clinic's (the "Health Clinic") and Pocatello Hospital LLC, d/b/a Portneuf Medical Center, LLC (the "Medical Center") and LHP Pocatello, LLC's ("LHP") Joint Motion to Stay Discovery (Dkt.28). Pursuant to the Court's discovery dispute procedure outlined in the Case Management Order, the parties contacted Court staff in attempt to mediate a pending discovery dispute. Unable to resolve the issues, Defendants move to stay discovery. For the reasons set forth below, the Court will deny Defendants' joint motion.

## BACKGROUND

Relator Dr. Jeffrey Jacobs initiated this action on behalf of the United States government pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3724, et seq. Jacobs alleges that Defendants submitted false certifications to the federal government in connection with payments to Medicare and Medicaid. More specifically, Jacobs alleges that Defendants falsely and fraudulently submitted, or caused the submission of, claims for medical services provided to Medicare and Medicaid patients who were referred to the Medical Center by the Health Clinic in violation of the AntiKickback Statute, 42 U.S.C. § 1320a–7b(b) ("AKS"), and the Stark Law, 42 U.S.C. § 1395nn.

All Defendants have moved to dismiss Jacob's Complaint without leave to amend on the grounds that Jacobs (1) fails to state a viable claim of relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure and (2) fails to plead fraud under False Claims Act with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. The parties' disagree about whether initial disclosures under Rule 26 of the Federal Rules of Civil Procedure must be exchanged and discovery commenced pending a decision on the motions to dismiss.

## ANALYSIS

Federal Rule of Civil Procedure 26(c) governs the granting of a protective order. A party seeking such an order must show "good cause." *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D.Ca.1990). A party seeking to stay discovery carries an even heavier burden and must make a "strong showing" for why discovery should be denied. *Id.* (citing *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975)). "The moving party must show a particular and specific need for the protective order, as opposed to making stereotyped or conclusory statements." *Id.* (citing Wright & Miller, Federal Practice and Procedure, § 2035).

Here, Defendants argue that a stay of discovery pending a decision on their motions to dismiss is warranted because the issues raised by Defendants' motions to dismiss speak to the threshold question of the sufficiency of Jacobs' Complaint and do not require factual discovery to resolve. In essence, Defendants have done no more than to argue in conclusory fashion that its motion to dismiss will succeed. This idle speculation does not satisfy Rule 26(c)'s good cause requirement. "The explosion of Rule 12(b)(6) motions in the wake of *Bell Atlantic Corp v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 129 S.C.1937 (2009), has made speedy determinations of cases increasingly more difficult....The fact that a non-frivolous motion is pending is simply not enough to warrant a blanket stay of all discovery." *U.S. ex rel. Howard v. Shoshone Paiute Tribes,* No. 2:10–CV–01890–GMN, 2012 WL 2327676, at *4 (D. Nev. June 19, 2012). In fact, such a notion is directly at odds with the need for expeditious resolution of litigation. *Gray,* 133 F.R.D. at 40.

*2 Defendants argue, however, that Relator must meet the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). This is true. But it is still not enough to justify a stay of discovery pending a motion to dismiss. Rather, courts have held that "a district court may stay discovery only if it is *convinced* that the plaintiff cannot state a claim for relief." *Howard,* 2012 WL 2327676, at * 1 (emphasis in original) (citing *Twin City Fire Insurance v. Employers of Wasau,* 124 F.R.D 652, 653 (D.Nev.1989) and *Turner Broadcasting System, Inc. v. Tracinda Corp.,* 175 F.R.D. 554, 556 (D.Nev.1997)). Other courts within the Ninth Circuit will allow a stay of discovery if, after taking a "preliminary peek at the merits" of a pending motion to dismiss, "there appears to be an *immediate and clear possibility* that [the pending motion to dismiss] will be granted." *GTE Wireless, Inc. v. Qualcomm, Inc.,* 192 F.R.D. 284, 286 (S.D. Cal. 2000).

The Court has taken a preliminary look at the pending motions to dismiss, and this is not case where the complaint is "glaringly deficient" and "completely wanting." *C.f. Jepson, Inc. v. Makita Corp.,* 34 F.3d 1321, 1327 (7th Cir.1994). Nor is it a case in which the defendant is not a person for purposes of the FCA as in *Howard.* Instead, this is a run-of-the-mill case involving a standard motion to dismiss under *Twombly* and *Iqbal* and Rule 9(b). Even if the Court grants the motions to dismiss in part, the likelihood is that the Court will also grant leave to amend, as granting leave is a commonplace response to technical shortcomings in a complaint. *United States v. Corinthian Colleges,* 655 F.3d 984, 995 (9th Cir.2011). Accordingly, the Court will deny Defendants' motion.

**ORDER**

IT IS ORDERED that Defendants' Joint Motion to Stay Discovery (Dkt.28) is DENIED.

**All Citations**

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Attorney for Defendant C.L. "Butch" Otter

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA**

| | |
|---|---|
| TRACY TUCKER, et al., on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. MOLLY HUSKEY, *et al.*, in their official capacities as members of the Idaho State Public Defense Commission,<br><br>Defendants. | **Case No. CV OC 1510240**<br><br>**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING DECISION ON MOTION TO DISMISS** |

## ARGUMENT

Defendants' pending Motion to Dismiss raises purely legal matters and, if granted, will dispose of this action entirely. The Idaho Supreme Court has said that it is within a court's

discretion to stay discovery pending ruling on a Motion to Dismiss that may dispose of all claims. "Because the control of discovery is within the discretion of the trial court, there was no error in the trial court's suspension of discovery since the motion to dismiss raised purely legal issues which were capable of resolution without a complicated foray into the facts." *Serv. Employees Int'l Union, Local 6 v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 761, 683 P.2d 404, 409 (1984). Given that the Motion to Dismiss is purely legal in nature, factual discovery is unnecessary, and it would be an undue burden on Defendants who may not even be parties to this action once the Motion to Dismiss has been decided to have to answer discovery now.

1. **Discovery is unnecessary at this juncture because Defendants' Motion to Dismiss may dispose of the case entirely.**

Defendants' Motion to Dismiss asserts that Plaintiffs' Complaint does not state a claim upon which relief may be granted as to *any* of the Defendants. This includes both state and federal law claims. The Motion to Dismiss relies on purely legal arguments as to the justiciability of Plaintiffs' claims against the named defendants. First, the State of Idaho is not a proper defendant in this action because it is not a "person" subject to suit under 42 U.S.C. § 1983, and so it cannot be sued for violating Plaintiffs' federal constitutional rights. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 2311 (1989) ("[N]either a State nor its officials acting in their official capacities are persons under § 1983"). Nor is the State a proper defendant under state law because the Court cannot enjoin the State as an entity under I.R.C.P. 3(b). *See Weyyakin Ranch Property Owners' Association, Inc. v. City of Ketchum*, 127 Idaho 1, 896 P.2d 327 (1995) (the designation of a governmental entity and not the elected officials individually did not comply with I.R.C.P. 3(b) when injunctive relief was

sought). These arguments are grounded in law, and no factual discovery would provide additional insight into rule or statute.

The other defendants named in the Complaint cannot be sued for the relief requested because an examination of the applicable statutes shows that they have no legal authority to affect the changes to the public defense system that Plaintiffs seek. Governor Otter and members of the Public Defense Commission have no direct control, administration, or responsibility for providing public defender services. That authority and responsibility was delegated to the counties by the Idaho Legislature in Idaho Code § 19-859, which states that "[t]he board of county commissioners of each county shall provide for the representation of indigent persons and other individuals who are entitled to be represented by an attorney at public expense." There is no factual discovery which could shed any light on the meaning of this statute, which is clear and unambiguous on its face. The responsibility and authority to provide constitutionally adequate public defense services in Idaho rests with the counties, not with the State, the Governor, or the Public Defense Commission. The named defendants are not proper defendants in this action, and they cannot provide the requested relief, as a matter of law.

Plaintiffs address this problem in their Response with the statement that "even if Defendants were to prevail on their motion to dismiss, Plaintiffs would simply file suit against other state or local defendants, thereby requiring the State to respond to the very same discovery requests in any event . . ." Response at 6-7. So, Plaintiffs posit, even if the wrong defendants have been sued here, they must nonetheless provide discovery, because Plaintiffs may at some point sue the correct defendants. This argument is unavailing here, in this proceeding, because, if Defendants prevail on their Motion to Dismiss, Defendants will be out of this case. If Plaintiffs file suit against other, later-to-be-identified defendants, then it will be up to those

defendants to address potential discovery requests made in that proceeding. The notion that Plaintiffs can name the wrong defendants in this proceeding and require them to respond to burdensome discovery requests because Plaintiffs might one day name the right defendants in another proceeding runs afoul of basic principles of civil procedure. To the extent that Plaintiffs plan in a future proceeding to propound discovery on Defendants as persons who are not parties to the lawsuit, that too would occur as part of that future proceeding, and would come under different Rules of Civil Procedure than those that allow Requests for Admission, for Production of Documents and for Interrogatories to be propounded to ***parties***.

What's more, the discovery propounded to these presumptive "other state and local defendants" would almost necessarily be of a different sort and scope. For instance, suit brought against a single county in Idaho would likely not result in discovery regarding all 44 counties in the State or all State officers. The proposition that Plaintiffs' current discovery is inevitable as propounded to these Defendants regardless of who is named in a future complaint is not just implausible, it is immaterial; if Defendants' Motion to Dismiss is granted, Plaintiffs can decide whether to initiate other proceedings against other defendants and propound whatever discovery requests they like. Possible discovery in a potential future proceeding is not a basis for denying a protective order in this proceeding.

**2. The discovery requested remains extensive and would constitute an undue burden on Defendants.**

Plaintiffs' assertion that Defendants would face "minimal or no burden" if they comply with Plaintiffs' supposedly narrowed discovery requests is simply untrue. Plaintiffs have still requested documents and information dating back to 2010. *See, e.g.*, Document Request No. 1 (requesting all documents relating to the provision of indigent defense services in Idaho since 2010). At least one request applies to *any* State official. *See* Document Request No. 24

(requesting "all documents relating to any informal or formal complaints or other information provided or conveyed by *state officials* relating to Idaho's indigent defense system and funding for that system, since the passage of the Idaho Public Defense Act in 2014") (emphasis added). Also, as nearly all of Defendants on the Public Defense Commission have served in other governmental positions as well, some of which necessarily involved privileged communications, responding to these requests would require substantial document review.

Plaintiffs point to having "narrowed" their discovery requests, but the discovery requested remains extensive and burdensome. Of nine interrogatories, Plaintiffs have suspended, for the time being, two. Of thirty four document requests[1], Plaintiffs have suspended eleven. Complying with the 23 document requests that remain would impose a substantial burden on Defendants who may be out of the case once the Court rules on the Motion to Dismiss. None of the twenty-seven Requests for Admission have been suspended.

There is no prejudice to Plaintiffs if discovery is stayed. If Defendants' Motion to Dismiss is granted, Plaintiffs will have lost nothing. If they choose to file a suit against other defendants, they will be able to conduct their discovery at that time, against the right defendants. If Defendants' Motion is not granted, or is granted only as to some Defendants, Plaintiffs will still have ample time to conduct discovery in this proceeding, again, against the correct defendants.

Most importantly, the remaining discovery requests shed no light on the issues raised in the Motion to Dismiss: namely, whether the State can be named as a party under § 1983, and what legal authorities and responsibilities Defendants have regarding the provision of public defense services, as provided by the constitution and statute.

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[1] Although the document requests number 35, document request 26 is empty.

## CONCLUSION

The pending Motion to Dismiss is purely legal in nature and may dispose of this case in its entirety. Proceeding with extensive discovery before disposing of the Motion to Dismiss would impose a substantial, and potentially unnecessary, burden on Defendants. For these reasons, Defendants respectfully request that the Court stay all discovery until after it has disposed of the pending Motion to Dismiss.

DATED this 18th day of September, 2015.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
MICHAEL S. GILMORE
Deputy Attorney General
Attorney for Defendants other than Governor Otter

OFFICE OF THE GOVERNOR

By _____
CALLY YOUNGER
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 18th day of September, 2015, I caused to be served a true and correct copy of the foregoing by the following method to:

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

**ORDER GOVERNING DISCOVERY**

## ORDER GOVERNING DISCOVERY

The Court, having considered the Defendants' Motion for Protective Order Staying Discovery Pending Decision on Motion to Dismiss, filed August 21, 2015, and having heard oral argument from the parties on October 16, 2015, hereby **GRANTS IN PART AND DENIES IN PART** that motion. The defendants are **HEREBY ORDERED** to answer plaintiffs' interrogatories numbers 1, 6, 7, and 8; to produce and permit the plaintiffs to inspect and copy the documents and materials requested in plaintiffs' requests for production number 32, 33, 34, and 35; and to answer all of the plaintiffs' requests for admission. The plaintiffs' other interrogatories and requests for production are **HEREBY STAYED**, and no depositions shall be commenced, until this Court's decision on the Defendants' Motion to Dismiss, filed July 8, 2015, or further order of this Court. If the motion to dismiss is denied, all discovery may proceed at that time.

DATED this 19th day of October, 2015.

Hon. Samuel A. Hoagland
District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20th day of October, 2015, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to each of the following:

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

**SECOND AFFIDAVIT OF RICHARD EPPINK**

## SECOND AFFIDAVIT OF RICHARD EPPINK

STATE OF IDAHO )
: ss.
County of Ada )

I, Richard Eppink, having been duly sworn upon oath, depose and say:

1. I am one of the attorneys for the plaintiffs in this case.
2. **Exhibit 1** to this affidavit is a true copy of a document titled "Remarks by Chief Justice Roger Burdick to Public Defender Interim Committee, August 15, 2013," which I downloaded from the Idaho Legislature's official website, using this link, http://legislature.idaho.gov/sessioninfo/2013/interim/defense0815_burdick.pdf, on November 23, 2015.
3. **Exhibit 2** is a true copy of a document titled "State of the State and Budget Address, Monday January 12, 2015," which I downloaded from the Governor of Idaho's official website, using this link, http://gov.idaho.gov/mediacenter/speeches/sp_2015/SOS%20FY%202016.pdf, on about November 10, 2015.
4. **Exhibit 3** is a true copy of document (Bates numbers D001153 through D001155) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.
5. **Exhibit 4** is a true copy of document (Bates numbers D000724 through D000725) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.

6. **Exhibit 5** is a true copy of document (Bates numbers D003065 through D003074) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.
7. **Exhibit 6** is a true copy of document (Bates numbers D000375 through D000378) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.
8. **Exhibit 7** is a true copy of document (Bates numbers D000364 through D000368) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.
9. **Exhibit 8** is a true copy of document (Bates numbers D000240 through D000244) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.
10. **Exhibit 9** is a true copy of Defendants' Responses to Plaintiffs' First Set of Requests for Admission to Defendants.
11. **Exhibit 10** is a true copy of document (Bates numbers D000410 through D000413) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.

12. **Exhibit 11** is a true copy of document (Bates numbers D000049 through D000055) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.

13. **Exhibit 12** is a true copy of document (Bates numbers D001149 through D001152) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.

14. **Exhibit 13** is a true copy of document (Bates numbers D001172 through D001180) produced to me by Defendants' counsel in this case, pursuant to this Court's October 20, 2015, Order Governing Discovery, in response to formal discovery requests propounded by Plaintiffs.

15. **Exhibit 14** is a true copy of Idaho Executive Order No. 2015-04, which I downloaded from the Governor of Idaho's official website, using this link, http://gov.idaho.gov/mediacenter/execorders/eo15/EO%202015-04%20Sage-Grouse%20pdf.pdf, on November 23, 2015.

16. **Exhibit 15** is a true copy of Idaho Executive Order No. 2015-03, which I downloaded from the Governor of Idaho's official website, using this link, http://gov.idaho.gov/mediacenter/execorders/eo15/EO%202015-03%20Epilepsy%20pdf.pdf, on November 23, 2015.

17. **Exhibit 16** is a true copy of Idaho Executive Order No. 2010-11, which I downloaded from the Governor of Idaho's official website, using this link,

http://gov.idaho.gov/mediacenter/execorders/eo10/eo_2010_11.html, on about November 19, 2015.

DATED this 23rd day of November, 2015.

Richard Eppink

SUBSCRIBED AND SWORN BEFORE ME this 23rd day of November, 2015.

INGRID ANDRULIS
Notary Public
State of Idaho

Notary Public for Idaho
Residing at: Boise
My commission expires: 4-22-2019

## CERTIFICATE OF SERVICE

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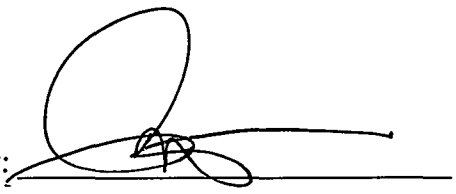
By: 

THE STATE OF IDAHO
SUPREME COURT

ROGER S. BURDICK
CHIEF JUSTICE

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# REMARKS BY CHIEF JUSTICE ROGER BURDICK TO PUBLIC DEFENDER INTERIM COMMITTEE AUGUST 15, 2013

I would like to thank the interim committee for inviting me to talk about the public defender system in the State of Idaho. My comments are based upon personal observations from having served as a public defender for four years in Gooding, Jerome, Lincoln and Camas Counties as well as a prosecutor in Ada and Jerome counties and now almost thirty-two years in the judiciary, twenty-two as a magistrate and district court judge and now ten years on the Supreme Court.

At the outset I want you to know that I fully support the Criminal Justice Commission's vision of key areas of study:

- The structure and organization of how Idaho will deliver its system of public defense
- How the system will be held accountable
- The standards and funding for training, and
- How best to provide on-going and stable funding to support Idaho's system of indigent defense.

Next, I would like to describe what a public defender's job entails. Our judicial system is a three-legged stool which depends on advocates for two sides – a prosecutor and a criminal defense attorney going to an impartial third party – the judge – who applies law to a set of contested facts. All three-legged stools are only as stable and useful for their intended purpose as the three legs. In Idaho's system of justice today, defense for the indigent is the weakest leg in the system. I am not in any way impugning the competence of the individual defenders but rather the system. Frankly, our system for the defense of indigents, as required by Idaho's constitution and laws, is broken.



EXHIBIT 1

As we look at our system of justice it is only right that the two advocates on either side of a factual dispute are roughly equal in terms of talent, resources, and time. The job of a public defender is not as envisioned by some to "get the guilty off through a technicality." The job of a public defender is an advocate to make sure that the government's case is grounded in fact and law. Throughout my years as a public defender, over 95% of my cases were concluded with entries of a plea of guilty. I estimate that figure is true today in all criminal cases. There seems to be little or no difference between the conduct of private and public criminal defense attorneys in terms of the final resolution of their cases. So prior to this plea of guilty, what will a public defender be doing?

First, a public defender contrary to any other lawyer practicing law has no control over who their client will be. These attorneys are doing a tremendous service to the community in their public defense work.

A public defender is notified of an appointment after an arrest has been made. The first step is usually at a hearing called an initial appearance where the defender finds out the allegation and first meets their client. Usually the public defender has minutes to obtain background information about the client's ability to secure a bond or other information.

Next, the public defender contacts the prosecutor for purposes of discovery and/or discussions concerning the case itself. This phase of the case can take minutes to months. Felony cases are serious allegations involving drug-related or property crimes and will take some time. A murder case, of course, or other crimes of violence may take a significant period of time to investigate, review and strategize for trial.

The defense attorney will interview their client, contact witnesses, and obtain all the information that law enforcement has gathered. Additional conferences are set with witnesses, client and family as well as the prosecuting attorney. There is also a determination based on the information, what violations, if any, can be proven beyond a reasonable doubt. This process of checking law and facts is what some refer to as plea negotiations. The end result is a plea of guilty or a trial if the matter is not dismissed. Once this phase is concluded the defense attorney's next responsibility is sentencing.

The sentencing phase is a significant part of a public defender's work. Most of the individuals who are on the public defender's caseload are individuals who have suffered lives significantly different than ours. Oftentimes, there is grinding poverty; sexual, physical or emotional abuse; alcohol and/or some sort of substance abuse or addiction; mental illness, lack of education, and as a result they have lived very chaotic lives. As a public defender I often times stood in wonder

at how some of my clients were still alive or that they functioned at all in modern society.

Most public defenders have an intimate knowledge of the resources in a community that are available to try to rehabilitate or place individuals prior to ultimate sanctions of jail or prison time. Most criminal defense attorneys will indicate to you that these facilities and alternatives are non-existent in many counties or lacking even in our largest cities and counties. I think your work on the public defender system will have a significant impact on the justice reinvestment initiative and save taxpayers money. An appropriately trained public defender can better see what placements are best based upon evidence based risk factors thereby saving taxpayers unneeded waste for services or incarceration.

The most significant factor in any sentence is the defendant's prior criminal record. Without that accurate prior criminal record it is very hard for an effective sentence to be determined.

Does the case end at sentencing? The short answer is "no" for felonies and "yes" for misdemeanors. In either case there is an issue of appeal and if it is in fact a misdemeanor the public defender of the county involved will be in charge of that appeal after consultation with their client. As concerns a felony there are not only significant issues of appeal, but also pleas of leniency pursuant to Criminal Rule 35, as well as uniform post- conviction relief issues.

For those of you not familiar, post-conviction relief is a statutory vehicle enacted whereby a defendant can file a civil suit alleging four basic grounds to have their conviction reviewed by the criminal court that imposed the sentence. The most common ground for the granting of a post-conviction relief petition is the incompetency of defense counsel. So a public defender not only must work with their client in making certain decisions throughout the case, but they must also be cognizant that they can be sued for incompetency of counsel at the end of their representation. As an aside, as a public defender, I often felt that I was battling not only the prosecuting attorney and law enforcement, but also my client in terms of their analysis of the case and what they thought should be the outcome, and also the attorney who was going to sue me at the end of the case in a post-conviction relief proceeding.

This gives you an idea of the responsibilities of a public defender in a criminal case. Public defenders also represent individuals in child protective act proceedings, juvenile corrective act proceedings, mental competency and commitment proceedings, extradition, and civil and criminal contempt proceedings. All of the basic responsibilities I mentioned for a criminal case apply to these proceedings.

I need to comment that child protection and juvenile justice cases present especially important examples of the need to insure attorneys who handle these cases are well trained; not only in the law, but that they know how to adequately represent these vulnerable children. Our judges tell us that in some counties, the newest attorneys are often assigned these cases, yet the complexity of the law and the vulnerability of the children represented require seasoned, well trained and capable attorneys. These laws can only be implemented as intended if qualified, trained lawyers are available.

## WHAT IS IDAHO'S HISTORY OF RIGHT TO COUNSEL

Even before Idaho had been admitted to the union, our territorial legislators enacted statutes relating to the right of counsel. The 1874 Criminal Practice Act, § 3, states "when the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate shall immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings and before any further proceedings are had."

If the defendant wished to have an attorney, the magistrate had to adjourn the examination and send a peace officer to take a message to the attorney within the township or city as the defendant may name.

Section 267 of the same act then describes what happens when the defendant is brought before the district court. "If the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel."

This concept of counsel at court proceedings was carried into the constitutional convention and made a part of the Idaho Constitution. Article I, §13, states in part:

> "Section 13. Guarantees in criminal actions and due process of laws – in all criminal prosecutions, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf and to appear and defend in person and with counsel. . . . "

The right to counsel in a criminal case has continued uninterrupted in one statute or another until today.

The policy embodied in these statutes predated by half of century the United States Supreme Court's pronouncement of the same Federal rule in *Johnson v. Zerbst.* In *Johnson,* the U.S. Supreme Court said a defendant in a federal prosecution has the right to counsel in a criminal case even if they couldn't afford

the same. In *Betts v. Bradley*, the United States Supreme Court refused, however, to extend the federal rule to the states by the Fourteenth Amendment, and Idaho was cited as one of eighteen states affording counsel to an indigent accused of a crime. The fact states had enacted their own provisions showed that federal protection was not needed.

Idaho's statute was enacted seventy-six years before the United States Supreme Court overruled *Betts v. Bradley*, and declared in *Gideon v. Wainwright in* 1963:

> "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trial in some countries, but it is in ours."
>
> "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Throughout the nation there are symposiums, speeches and articles celebrating the 50TH anniversary of the *Gideon* decision.

However, forty years earlier than *Gideon v. Wainright,* in 1923 the Idaho Supreme Court stated in *State v. Pontroy*:

> It is the public policy of this state, disclosed by constitutional guarantees as well as by numerous provisions of the statutes, to accord to every person accused of a crime, not only a fair and impartial trial, but every reasonable opportunity to prepare his defense and to vindicate his innocence upon a trial. In a case of indigent persons accused of crime, the court must assign counsel to the defense at public expense."

As can be seen by this very plain statement, the right to be represented by an attorney at state expense is one of Idaho's basic tenents of criminal law. Not only is it a basic tenent that defendants have the right to be represented by an attorney, they must also be given the right to a fair and impartial trial and be given every reasonable opportunity to prepare his defense to vindicate their innocence upon trial. These words of "fair and impartial trial" and "reasonable opportunity to prepare for his defense" have been the laws of this state since before statehood and certainly since 1923.

Historically those protections have been explored by federal and state law and have been expanded to juvenile proceedings and post arrest interrogation, line ups, other identification proceedings, preliminary hearings, arraignments, plea negotiations, sentencing proceedings, rights of appeal, and probation violation proceedings. Additionally, since the 1960's courts throughout the nation have further defined what a fair and impartial trial is and what is needed in modern advocacy to prepare and present a fair and impartial trial. Additionally, every criminal defendant in Idaho by statute and constitutional history must be given a reasonable opportunity to prepare his defense.

As we go forward ask yourselves are we in fact protecting and enhancing these statutory and constitutional responsibilities? We should be in fact trying to uphold these ideals that were handed to us about 140 years ago.

## THE IDAHO COURTS' RESPONSIBILITY

Pursuant to Title 3 of the Idaho Code specifically Idaho Code § 3-101, the Idaho Supreme Court has exclusive power in the admission and policing of attorneys in the State of Idaho. Additionally, the Idaho Supreme Court must approve all rules defining the power of the Idaho State Bar pursuant to Idaho Code § 3-408 touching on rules of professional conduct for attorneys. As such, the Idaho Supreme Court has a significant interest in how the public defenders of the State of Idaho are carrying out their duties to defend Idaho citizens.

However, the Court also understands the power of the legislature to set public policy of how best the State of Idaho can meet its constitutional and statutory duties to provide for the criminal defense of indigents. As such, the Idaho courts stand ready to help this committee in any way possible.

For instance our existing and certainly our new technology systems will track and manage cases assigned to public defenders and will allow you and the counties to hold the system accountable as well as track expenses and other costs.

Speaking of costs, I would urge the committee to consider other recommendations to provide a fair method of public defender reimbursement. Considerable work has been completed in the area of a defendant's financial obligations and their impact on the system, society and recidivism. We can acquaint the interim committee with this data and offer recommendations.

We would be pleased to present these recommendations and others to you at subsequent committee meetings. For instance a panel of administrative district judges will meet on October 17 to answer questions from the front lines and provide their experienced perspective on these issues.

Your third branch of government will be active in making sure the interim committee is given factual information as well as any help necessary so you can craft a public policy that carries out Idaho's long tradition of constitutional and statutory representation of indigent persons.

I believe strongly that Idaho must aggressively improve the system that exists today. Any change which takes place should have as benchmarks the following broad principles.

First, I think the legislature and Governor's enacting of House Bills 148 and 149 to clarify who is entitled to an attorney at public expense is an important first step.

Secondly, since 1923 Idahoans have had the right for every "reasonable opportunity" to prepare a defense. This starts with time – time to interview, investigate and prepare legal arguments. All of Idaho public defense attorneys do not have that time. Appropriate caseload numbers exist from state and national organizations. These should be closely examined by the interim committee and made enforceable.

Every reasonable opportunity for a fair and impartial trial should include competent attorneys who are trained and have an experience level commensurate with the case or crime. This necessitates a well-funded, systematic state-approved training program. Remember the large sums of state and county dollars used for training for other members of the criminal justice system.

Part of the funding issue needs to include an analysis of lowest bidder or fixed fee contracts. The conflict of economic interest is inherent in this approach and must be eradicated.

Idaho has already defined the parameters of our task to "make sure that every person accused of crime, not only is given a fair and impartial trial but every reasonable opportunity to prepare his defense and vindicate his innocence upon trial." It has been the duty of this state before statehood and continues today. It is our duty to protect these fundamental ideals for the future.

Thank you for your time here today.

C.L. "BUTCH" OTTER
GOVERNOR

# STATE OF THE STATE AND BUDGET ADDRESS

MONDAY, JANUARY 12, 2015

Mr. Speaker, Mr. President, Honorable Justices and Judges, my fellow constitutional officers, distinguished legislators and members of my Cabinet, honored guests, friends, my family and our First Lady ... my fellow Idahoans.

Allow me first to comment briefly on two men who were with us here throughout the first eight years of my tenure in this office – Superintendent of Public Instruction Tom Luna and Secretary of State Ben Ysursa.

During my time in government I have seldom been privileged to work so closely with two individuals more devoted to the public interest or more motivated by the better angels of public service than Tom and Ben.

Please join me now in an appreciation of their work, their legacy, and their friendship.

To our newly elected legislators and constitutional officers, congratulations and welcome. I applaud your willingness to serve. I respect and appreciate your civic virtue. And I encourage your attention, patience and commitment to the processes and purposes of our State government.

Like you, I am beginning a new term in office. It is an honor and a privilege to have once again garnered the support and confidence of the citizens of Idaho.

Like you, I take that responsibility very seriously. And I know that public confidence must be earned anew every day. So let us begin our work together unfettered by cynicism or mistrust, and with a sure understanding of our limitations as well as our potential.

With you, I look forward to advancing the interests of the people we serve.

With you, I am committed to continuing our efforts to make Idaho what America was meant to be.

Ladies and gentlemen, we are blessed to live in interesting times. There is unrest and uncertainty all around us. But that's nothing new to the human experience.

There has never been a shortage of issues upon which well-intentioned people could earnestly and actively disagree in any free and dynamic society.

We also are blessed to live in a nation and a state where there is an orderly, responsible, citizen-driven process for sorting out and addressing those issues. Our process is not designed to satisfy everyone. Nothing ever can. But it is designed to do more than stimulate public discussion and debate.

Ultimately, it must inspire resolution and progress – however imperfect or incomplete.

That is the lodestar on which we must find our way forward in the days ahead.

Unfortunately, that has not been a hallmark of our national government in recent years.

From immigration to energy and from environmental protection to budgeting, there is neither rhyme nor reason to how the federal government does – or does not – do its job.

Partisan rancor and political infighting are unacceptable excuses for inaction and dysfunction. Here in Idaho we have not only the opportunity but the responsibility to set a higher standard, and then live up to it.

I ran for Governor in 2006 because my six years in Congress taught me that the states are where our Republic must meet today's challenges and prepare for those that lay ahead.

That is just as true today, and even more apparent. So I am more determined than ever for Idaho to embrace that opportunity.

It will mean setting an example of both fiscal responsibility and policy vision, especially on those issues that are fundamental to our future prosperity, consistent with the proper role of government and aligned with our Idaho values. That will require all of us working together rather than at cross-purposes.

We must not allow ourselves to emulate the federal government's politics of division, procrastination and misdirection for which we all are paying the price.

In some cases and on some issues, we already have put off making some tough decisions for too long. That cannot and must not continue. Today, I will outline some issues on which I believe we must act – not in careless haste but with all appropriate dispatch.

Perhaps the most important message I want to leave with you today is simply this: **Idaho Learns**.

We learned the value of being more frugal and accountable with taxpayer resources during the Great Recession. We learned the value of preparation and consensus building during our discussions concerning transportation funding. We learned the value of process and inclusion during our efforts to improve education. And we have learned that even the best intentions and plans must be carried out with equal attention to detail and public perceptions from our contract experience with the Idaho Education Network.

**Idaho Learns**.

And those lessons run deep.

As a result of our experiences we move forward more confident in our abilities, more certain in our goals, and better prepared for the challenges before us. Future generations will benefit from our efforts to apply these lessons today.

I am not here to offer panaceas or to insist that your deliberations proceed in a particular direction – we are after all separate but equal branches of State government.

Instead, I am here to offer my view of what our state priorities should be and where our resources can be most effectively used in the public interest.

That list begins with education.

Last year in this chamber I laid out a five-year plan for sustainably and responsibly investing in our public schools.

I greatly appreciate your support for achieving those goals and I encourage your continuing help in seeing this process through as we welcome new Superintendent of Public Instruction Sherri Ybarra.

In Idaho, public schools are the most fundamentally proper role of government. They are essential to the health of our families, our communities and our economy.

In addition to the choices that parents are afforded with home schooling, charter schools and private schools, world-class public schools can set the bar for higher individual achievement. They are the key to our prosperity and Idaho's competitiveness in the global marketplace.

As you know, our school improvement plan is based on the recommendations of my broad-based, bipartisan Education Task Force, which was led and facilitated by the State Board of Education. The goal of its recommendations is to build a public school system that is focused on student outcomes, responsive to local needs, respectful of the role of classroom teachers, and more accountable to parents, patrons and taxpayers.

The Fiscal Year 2016 Executive Budget recommendation I am submitting to you today provides more funding for teacher training and professional development, and a significant infusion of money for teacher compensation under the new tiered licensure and career ladder proposed by the State Board of Education.

To support continuous improvement, my recommendation provides additional funding to help local school districts conduct planning on how best to improve the education of our children every year.

In addition, I'm calling for another $20 million in discretionary operating funds for local schools in fiscal 2016.

My recommendation also includes funding to provide more career and college counseling for students. As we implement our K-through-Career goals I want students and parents to have the best information available in making important decisions about courses, programs and post-secondary opportunities that will give them a leg up toward success in the workforce.

My total General Fund budget request for the coming year represents a 5.2-percent increase.

But my proposal for public schools calls for 7.4 percent more funding. That's almost $60 million more than we allocated for schools before the Great Recession began in fiscal year 2009.

Beyond the numbers, I'm also calling on the State Board of Education and our education partners to work together to develop a comprehensive plan for improving literacy and reading proficiency. Reading at grade level by the end of third grade is a major foundation for a student's education. It enables their success in every other subject area. We absolutely must prepare our students by doing more to achieve this critical benchmark. Anything less is simply unacceptable.

My hope while you consider this request is that we work together to continue assessing the impact of the current year's investments and seek to advance those policies and processes that work best for Idaho students.

We know that one of our initiatives to improve the quality and equity of the public school experience for our students is the Idaho Education Network.

It enables students in Salmon and Montpelier to get the same kind of advanced instruction as those in Sandpoint and Meridian. It enables Idaho to overcome our geographic and socioeconomic barriers. It allows us to realize the kind of opportunities for enlightenment and progress that not long ago were available only in our largest and most connected communities.

The kind and quality of courses and the level of instruction provided by the IEN truly is staggering. I believe its value is beyond question. The IEN is an asset that must be maintained. The challenges in continuing this world-class educational tool can and should be overcome.

I am committed to fulfilling the vision and promise of the IEN, which will start with rebidding the contracts involved, but also includes a strong recommendation for full funding of IEN operations in fiscal 2016 to ensure the service is continued for Idaho students.

One of the benefits of the Idaho Education Network continues to be the ability to bring college-level courses into high school classrooms throughout Idaho. That in turn helps ensure that more of our students are adequately prepared for the academic rigors of college life.

Our colleges and universities have been spending too much time, money and energy on remedial programs to bring Idaho high school graduates up to a post-secondary level of competence on such critical subjects as science, math and reading comprehension.

Many of our employers also are having trouble finding workers with the skills they need in an increasingly complex economy to enable those businesses to remain competitive.

And I'm not just talking about computer science, engineering and healthcare fields; we have businesses struggling to find enough well-trained and qualified welders, technicians and other trades positions. In fact, at current levels of economic growth we are going to be tens of thousands of employees short of industry demand for the skills and level of post-secondary training and education they need in the coming years.

That's why our efforts to better prepare students to be contributing members of society now extend beyond the old K-12 focus to a K-through-Career emphasis.

Education must not be allowed to end with high school.

We have a responsibility to use our tax dollars more strategically and effectively – and to build and strengthen partnerships with employers – if we are to meet our goal of at least 60 percent of Idaho citizens between the ages of 25 and 34 having a post-secondary degree or professional certification by 2020.

Folks, that's just five years down the road. We have a lot of work to do to achieve this worthy goal.

Already the Board of Education and our higher education institutions are working more closely than ever with the Department of Labor, the Department of Commerce, Professional-Technical Education, Health and Welfare and local organizations to develop commonsense plans for meeting our workforce development needs.

That includes more pronounced, targeted and sustainable investments in such programs as the computer science initiative at Boise State University, an employee readiness initiative at the University of Idaho, career path internships at Idaho State University, and the Complete College Idaho program throughout our higher education system.

Those are amongst the top priorities at each of our schools, and I'm asking for your continuing support to help them succeed – to help US succeed in building a comprehensive system of education and workforce training opportunities so that **Idaho Learns** applies to all the citizens of our state.

I'm also pleased to report some good news from the efforts of our Leadership in Nuclear Energy Commission or LINE Commission and the Center for Advanced Energy Studies—CAES. As you will recall, that group did an outstanding job highlighting the strengths and capabilities of our National Lab – and one of their key recommendations focused on "regionalizing CAES" by including other state partners.
This past fall my good friend Governor Mead and the University of Wyoming agreed to join as equal partners in the CAES consortium of our state universities.

This is but the first step in a continuing effort to fulfill the promise of the INL and CAES.

Let me talk for just a moment now about something that you won't find in my budget recommendation. But I believe it has the potential to improve the lives and enhance the opportunities of many Idaho citizens. I believe that because we've already seen it happen right here in this valley.

In 2007, my first year as Governor, the Treasure Valley was one of the last metropolitan areas in America without a community college. That year the Legislature enacted my request to provide a State incentive of startup funding for any local jurisdictions where voters opt to establish a community college district. Ada and Canyon counties soon stepped up to the challenge and voted to establish the College of Western Idaho.

And what a tremendous success it's been. It's forever changed the way education is delivered here in Idaho's most populated area. It's hard to even imagine this valley now without CWI playing a significant role in our future.

Thanks to the incredible efforts of President Bert Glandon, the visionary leadership of the College of Western Idaho Board and collaboration with Boise State University and others, CWI joins as a full partner with the College of Southern Idaho and North Idaho College in fulfilling the promise of true "community" colleges.

They are providing affordable, accessible and responsive resources for both students and employers to meet their education and career-training goals.

Through them, **Idaho Learns** is taking on a broader definition.

Providing that opportunity for our citizens during the economic downturn was critically important to our recovery.

Now that we are rebounding, we find ourselves faced with growing demand and intensifying need for the services that community colleges are uniquely able to provide.

So today I challenge again the underserved communities of Idaho where no broad-based community college programs now exist to canvass their citizens and businesses on the value that can be added to their economic development and public enrichment efforts by establishing a community college district of the size and focus that will meet their local needs.

Those needs and my challenge for local leaders to address them will be part of the discussion in each town I visit to conduct Capital for a Day. We did it with CWI and we can do it again.

Preparing Idahoans for the workplace is the primary focus of the Idaho Department of Labor. It's not just about sending out unemployment checks.

And the experts at Labor and our other State agencies now have a clearer picture than ever of where our people will be working in the years ahead – if they are educated and trained to do the kinds of careers being created.

We now expect to outpace the national employment growth rate with 15,000 job opportunities a year being created for Idaho workers through 2022 – many of them in the healthcare and construction fields.

That's why Director Ken Edmunds and his team at Labor have developed a plan for retaining, recruiting and returning employees to Idaho to help meet the demand for skilled workers.

The idea behind the "Choose Idaho" initiative is to bridge the coming labor shortage by keeping Idaho's best and brightest right here at home, encouraging former Idahoans to come home, and welcoming people with new skills to our communities.

To help build on that effort, my budget recommendation for fiscal 2016 includes a transfer of $5 million for Industry Sector Grants.

That will help build partnerships between industry and our education system to more effectively address a growing shortage of skilled and trained employees – a key element of our K-through-Career goals.

At the same time, I'm pleased that the Department of Labor was able to announce last month that Idaho's economic recovery and job growth will allow the unemployment insurance tax rate paid by Idaho businesses to fall for the third consecutive year – this time by another 16.8 percent. That means tens of millions of dollars in savings that can help capitalize additional Idaho growth.

I appreciate your support over the years for reducing the tax burden on Idaho citizens. From increasing the grocery tax credit to lowering income tax rates and providing personal property tax relief, we are keeping almost $157 million in the hands of Idaho taxpayers during 2015. And that will grow to more than $169 million during the year that begins July 1 as our economy keeps expanding.

Director Jeff Sayer and his team at the Department of Commerce are working hand-in-glove with Education, Labor, Transportation, Agriculture, Health and Welfare and other State agencies to leverage market-driven economic growth into improving how employers see Idaho. Their goal is nothing less than to make Idaho a global leader in growth and prosperity.

And we have some great resources to help Accelerate Idaho, including the Tax Reimbursement Incentive or TRI that you approved last year. This performance-based tool is attracting great interest from businesses ready to create thousands of jobs and invest billions of dollars in Idaho's future.

Thank you for recognizing that **Idaho Learns** extends to the lessons from other states where government is mortgaging its future to up the ante on attracting new businesses.

By contrast, the TRI requires employers to prove up their commitment to Idaho with jobs and capital investments before a dime of their tax payments are reimbursed. And most importantly, the TRI is getting just as much attention from our homegrown Idaho businesses looking to expand as it is from employers outside Idaho looking for a better place to achieve their goals.

One of the most crucial parts of making Idaho a better place to do business and create jobs is improving our infrastructure. My budget recommendation includes an additional $3 million infusion for the Idaho Opportunity Fund at the Department of Commerce. That money is used for strategic grants to help Idaho communities provide the water, power, wastewater treatment, roads and other infrastructure necessary for new or expanding businesses.

A great example of the return on investment from our Opportunity Fund is Cives Steel. When one of the nation's largest steel fabricators was looking to expand west of the Mississippi River it found a home in Ucon, just north of Idaho Falls.

It landed there for a number of reasons, but one factor in particular helped seal the deal: Ucon was able to secure a $400,000 Idaho Opportunity Fund grant to support infrastructure needed for the Cives operation. So far the employee-owned company has invested about $10 million in facilities and equipment in Idaho. That figures to grow to about $32 million as Cives creates more than 150 career opportunities in Bonneville County.

You know as well as I do that every Idaho community that's been passed over by a new or growing employer understands the value of those grants. But they only help address a small fraction of our statewide infrastructure needs.

The biggest of the big-ticket items in our infrastructure inventory is our long-term, multibillion-dollar investment in Idaho's roads and bridges.

And if **Idaho Learns** means anything at all, it's time for us to address that elephant in the room.

Our own circumstances and the realities of our national government require us to seize the opportunity to become more self-reliant, to be the architects of our own destiny rather than the afterthoughts of a federal funding system that could be skewed to our disadvantage. There's a real possibility that Congress will try to pass a transportation funding bill in the coming year – maybe as early as the spring.

A cold, hard assessment of the politics involved indicates that we run the risk of getting left in the lurch if that federal legislation changes the Highway Trust Fund formula so that we wind up paying in more than we're allotted for our needs in Idaho.

A survey last winter showed that most Idahoans believe our aging highways and bridges will need attention within ten years.

That's one benchmark to consider.

But the maintenance backlog we already have makes it even more important to figure out now how to pay for the hundreds of millions of dollars in improvements needed to protect Idaho lives and corridors of commerce.

Ladies and gentlemen, we know that after education, investing in infrastructure is among the smartest, most cost-effective and frankly essential uses of taxpayer dollars to promote the public's general welfare and sustain economic growth.

And that truth is being embraced by voters. It's interesting to note that roughly half of the survey respondents said transportation funding should be among the Legislature's top three priorities – even though most are satisfied with the condition of our roads and bridges right now.

They get it. Building and maintaining infrastructure is not an overnight proposition – whether it's highways, broadband connectivity, electric transmission lines or water treatment facilities. It takes planning and a commitment to sustainable long-term investment.

We already have 785 state and local bridges in Idaho that are over 50 years old and considered structurally "deficient."

That number will grow to almost 900 bridges by 2019 even after completing work on the 68 for which we already have funding.

This isn't a matter of Hennie Penny telling us that the sky is falling. It's a real problem, but we know how to fix it if we have the resources. Major Idaho highway improvement projects since 2009 – mostly funded by GARVEE bonds and federal stimulus money – have reduced the accident rate on those routes by 35 percent and the death rate by 25 percent.

Under Director Brian Ness and Board Chairman Jerry Whitehead, the Idaho Transportation Department is making significant strides in efficiency and more effectively using limited highway resources. ITD has eliminated more than 100 full-time positions since 2013 alone by reducing layers of management. It now is recognized among the best-run transportation agencies in America.

I fully understand the misgivings of some about higher transportation costs.

But there is something to be said for the old adage about being "penny wise and pound foolish." In fact, every dollar we invest now in our roads and bridges will save motorists and taxpayers $6 to $14 later.

Chairmen Brackett and Palmer, legislative leaders, I am not going to stand here and tell you how to swallow this elephant. That would be contrary to all we have learned about each other and the people we serve in recent years. But we all know it must be done. I welcome financially responsible legislation that addresses steady, ongoing and sustainable transportation infrastructure in Idaho; however, I will NOT entertain proposals aimed at competing for General Fund tax dollars with education and our other required public programs or services.

That raises the question of taxation.

So allow me to reflect for just a moment on our Idaho tax system and its conformance with the basic tenets of equity, certainty and simplicity. By that I mean taxation must be fair in its policy and administration across taxpayer classifications; it must be predictable so that taxpayers can plan and prepare as they conduct their business and personal affairs; and it must be understandable so that taxpayers have a fighting chance of making sense of the tax code and its impact on them.

As it stands today, Idaho unfortunately has become a confusing hodgepodge of taxing authorities. That undermines public confidence that those who collect the tax are accountable to citizens for how the revenue is used. With that and the benchmarks of equity, certainty and simplicity in mind, I'm asking for your help today in ensuring that over the coming four years we can make Idaho's tax system one of the best in the nation.

I believe that work should start now by enacting the recommendations from the task force I assembled last year to consider improvements to how the Idaho State Tax Commission operates. Those recommendations are aimed at improving the efficiency, accountability and transparency of our revenue operations. That includes refining the role of the Commission itself with the addition of a director over day-to-day agency business.

By now most of you know that I would like to see us further reduce the marginal rates for Idaho's individual and corporate income tax below 7 percent from their current 7.4 percent, as well as the complete elimination of the personal property tax. To that end, my budget recommendation sets aside the first year of a five year approach to reduce our income tax brackets from 7.4 percent to 6.9 percent.

This effort will provide relief to 44 percent of taxpayers this year and up to 51 percent of taxpayers by 2018.

I also believe the time has come for Idaho to prepare for a potential change in federal law to address the issue of tax equity. It's called the Marketplace Fairness Act.

As many of you know, that legislation now before Congress would clarify the legal authority of states like Idaho to impose and enforce a sales tax on interstate purchases of goods online.

Not only is this a fundamental matter of fairness for those brick-and-mortar businesses in our communities. It also is a matter of securing our own long-term prosperity.

Simply put, every dollar of sales tax from online purchases that goes uncollected is the better part of a dollar that is NOT going to support the necessary and proper roles of our State government – especially meeting the education and infrastructure needs of our growing economy.

Congress has yet to act. But the legislation has support from within our own Idaho delegation.

On the topic of Congress, I believe the chances now have improved – if only marginally – to repeal or more likely make incremental changes to Obamacare that would have a real impact here in Idaho.

I have studied the recommendations of my Medicaid Redesign Workgroup and agree with its findings – up to a point. I especially appreciate the Workgroup's strong focus on personal accountability, requiring co-payments, and managed care.

But more broadly, **Idaho Learns** should also apply to these findings and their experience. The Workgroup did its homework and deserves an opportunity to share what they have learned. I am asking you to hold hearings this session, listen to their findings, ask questions and educate yourselves on all the work they have done.

We worked together collaboratively and with great success on creating Your Health Idaho. After some initial trials, Idaho now is successfully running its own insurance exchange cheaper, more efficiently, with less staff and with better service than the national system that overpromised and profoundly under-delivered. That's because Your Health Idaho is locally run and utilizes insurance agents and brokers working in the free market.

In fact, the marketplace is the key to how Idaho is advancing our goal of making health care more affordable and accessible for all Idahoans.

Many people in this state have quietly gone about the business of putting Idaho at the forefront of the changing healthcare landscape.

By building public-private partnerships, Health and Welfare Director Dick Armstrong and the men and women who are working on the State Healthcare Innovation Plan are changing the way we pay for and deliver healthcare services – including Medicaid.

Those who are working diligently in both the public and private sectors to improve healthcare outcomes in Idaho deserve our sincere thanks.

My thanks also go to the Legislature and those advocates who are enabling us to more aggressively address the local challenges of behavioral health. Less than a month ago I was in Idaho Falls to cut the ribbon on Idaho's first Behavioral Health Crisis Center, where people with mental health or substance abuse problems can get short-term help without going to a hospital emergency room or a jail cell.

It's an important part of the broader improvements needed in our community-based services. We know that best practices across the country show that such local facilities reduce law enforcement and hospital-related costs while providing more sustainable support and better access for vulnerable citizens. That's why I once again am requesting funds for an additional Behavioral Health Crisis Center in the coming year.

Another decision for which I'm proud of the Legislature, our courts and our Executive agencies is their unprecedented collaboration in enacting and now implementing the Justice Reinvestment Initiative or JRI.

This is an effort started two years ago by the good chairmen of our House and Senate Judiciary committees.

Last year's overwhelming legislative support for Senate Bill 1357 and hard work during the past year by our courts, Department of Correction and Commission of Pardons and Parole has resulted in an outstanding set of administrative rules for you to consider during this session.

They spell out in detail how we can improve public safety, reduce recidivism and lower the costs associated with locking up offenders by prioritizing and refining our post-release supervision efforts with swift, certain and graduated sanctions.

I appreciate your continuing support as our Justice Reinvestment efforts move from careful planning to effective on-the-ground implementation.

I hope you will consider it equally important to continue our work toward addressing the very real challenge we face in our public defense system.

The courts have made it clear that our current method of providing legal counsel for indigent criminal defendants does not pass constitutional muster.

This is a priority for our counties so it also must be a priority for us. If we value the ideals embodied in the Fourth, Fifth, Sixth and Eighth amendments to the U.S. Constitution, then it is undeniably our responsibility to take the phrase "due process of law" as seriously as the Framers intended.

Which brings me to another constitutional issue – the defense of traditional marriage.

Last year we found ourselves in the position of defending an amendment to the Idaho Constitution approved by voters in 2006 and – I believe – truly representing both the intentions and the values of our citizens. It defines marriage between a man and a woman as the only "domestic legal union" valid in Idaho.

It is incumbent upon those of us sworn to uphold and defend our Constitution and to do so based on its content now – not on changing societal views since it was enacted or how any of us would write it today.

Therefore, I will continue to do all I can to uphold my oath and defend our Idaho Constitution.

I am hopeful that our recent request for the U.S. Supreme Court to review the issue will be accepted and that we can look forward to an outcome that affirms our Constitution.

It's unfortunate that so many of our differences with the national government wind up in court. But in the absence of any federal consensus on a multitude of issues, too often the courts become the last refuge both for public policy disputes and safeguarding our freedoms.

That may well be where such questions as protection of sage-grouse and siting of electricity transmission corridors end up. I hope not, and we are working hard with Idaho landowners, sportsmen, federal land managers and other stakeholders to find common ground through our administrative processes on those issues and others.

During the past year we completed the historic Snake River Basin Adjudication process. The largest single-stream adjudication in U.S. history took 27 years and covered water rights on about 87 percent of Idaho's land area. We advanced our efforts to similarly adjudicate all northern Idaho water claims. And we made great progress on our efforts to preserve, recharge and more sustainably manage our water throughout the state.

In addition and with gratitude for your help and support, I'm proud to announce that there now are five Rangeland Fire Protection Associations throughout Idaho. They are organized and prepared to launch initial attacks when wildfire threatens any of more than 3.5 million acres of state, private and BLM rangeland in our state.

Ladies and gentlemen, look high above you. Within this magnificent chamber so beautifully renovated just a few years ago, you see an Idaho sky through a vaulted dome of glass. This chamber, this building, this body has all the room that anyone could need to accommodate the biggest, loftiest and most meaningful ideas and actions.

In fact I would measure that the entire church used in the summer of 1787 to create this great Republic would but fill this chamber.

So as you begin your deliberations today, don't limit yourselves.

Think big. Be bold. Act decisively. Reflect the Idaho values you were sent here to represent.

And as you consider the magnitude of the work ahead and how it will benefit the citizens we serve, keep looking up toward higher aspirations.

Keep looking up and apply what **Idaho Learns** so that our fondest hopes and best intentions will lead to a better tomorrow for future generations.

Join me in putting Idaho and our people first and foremost in your minds.

Good luck, Godspeed, and may God continue to bless America and the Great State of Idaho.

Thank you.

**IDAHO CRIMINAL JUSTICE COMMISSION**

*"Collaborating for a Safer Idaho"*
*Established 2005*
C.L. "BUTCH" OTTER
*Governor*

# Recommendations of the Public Defense Subcommittee

Adopted May 24, 2013

The Sixth Amendment of the U.S. Constitution provides that the accused shall enjoy the right to the assistance of counsel in all criminal prosecutions. As with other rights that are fundamental and essential to a fair trial, the vindication of the Sixth Amendment right to counsel is a state responsibility. Although a state may delegate its duty to apprise citizens of this right to counties, it is ultimately the state's responsibility to ensure that the constitutional obligation is met.

In 2009, the Idaho Criminal Justice Commission ("the Commission" or "ICJC") formed a Public Defense Subcommittee ("the Subcommittee") tasked with developing recommendations for improvement of Idaho's public defense system. In January of 2010, the National Legal Aid & Defender Association ("NLADA") released a report which suggested that Idaho is not adequately satisfying its Sixth Amendment obligations. For more than three years, the Subcommittee committed itself to identifying improvements to be made, and its efforts yielded four pieces of proposed legislation.

The first piece of legislation provides uniform eligibility requirements for the appointment of counsel at public expense. More specifically, the amendments—first—redefine the term, "serious crime," to include any offense the penalty for which includes the mere possibility of confinement. The Subcommittee observed that some Idaho courts—expecting that a jail sentence will ultimately not be imposed—do not appoint counsel, whereas other courts will appoint counsel if the applicable criminal statute provides for the mere possibility of a jail sentence. Constitutionally, a person is entitled to counsel if he or she faces actual imprisonment, even for violation of probation. In other words, a person may not be sentenced to incarceration or have his or her suspended sentence imposed without having been previously availed of the right to counsel. The proposed changes to § 19-851 will avoid ambiguity and will ensure that all Idahoans are appointed counsel under the same circumstances and in conformance with constitutional demands.

Similarly, the Subcommittee learned that there is variance in terms of who financially qualifies for appointment of counsel. While the current statute enumerates several factors that courts may consider, there is no uniform standard of financial eligibility. The proposed amendments will require the courts to presume a person is financially eligible for appointment of counsel if certain objective factors are present. However, the courts will still have discretion to either deny appointment of counsel in spite of the financial presumptions or to appoint counsel in lieu of them.

The Subcommittee also acknowledged that requiring a person to complete a financial affidavit in order to qualify for appointment of counsel puts the person in a constitutional predicament. Under penalty of perjury, a person could potentially be compelled to disclose information that would be incriminating, such as the existence of, say, illegal income or assets.



**EXHIBIT 3** 000329 153

In such a situation, the person is forced to choose between the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. To remedy this dilemma, the proposed amendments to § 19-854 will restrict the admissibility of information provided in financial affidavits. This will encourage full and accurate disclosure and behoove efforts to limit appointment of counsel to the truly indigent.

Next, the Subcommittee discovered that there is inconsistency in terms of whether people are required to contribute to or repay the cost of their court-appointed attorney. What is more, the Subcommittee is concerned that current contribution and recoupment practices may discourage people from requesting or accepting the appointment of counsel. Some counties require an application fee up-front and/or warn people that they may have to repay the cost of counsel with little-to-no notice of how much it will cost them. Because of this potential for discouragement, the Subcommittee recommends that § 19-854 be amended to prohibit pre-dispositional contribution and to limit post-dispositional recoupment to the costs associated with conviction, if any.

Last, the amendments to Title 19 add "defending attorney" as a defined term to include the myriad public defense practitioners in Idaho who are private attorneys appointed by the court on a case-by-case basis or contracted by the county on a systematic basis. The Subcommittee realized that many public defense attorneys do not currently file annual reports pursuant to § 19-864 because the statute only expressly applies to county offices of the public defender. By expanding the reporting requirements to all attorneys providing public defense services, the amendments will facilitate the collection of comprehensive data—a foundational prerequisite to meaningful assessment of Idaho's public defense system.

The second and third pieces of legislation propose amendments to the Juvenile Corrections Act and the Child Protective Act, respectively. With regard to the Juvenile Corrections Act, the proposed legislation amends § 20-514 to expound the circumstances in which juveniles are appointed counsel and to conform their right to counsel to that of adults. The Subcommittee found that counsel is particularly important for juveniles, given that children generally may not understand or appreciate the legal process. For the same reason, the Subcommittee concluded that, although it is impractical to prohibit juveniles from waiving their right to counsel in all situations, certain proceedings should preclude waiver. As such, the amendments set forth particular requirements that must be met before a juvenile may waive the right to counsel and also enumerate the situations in which waiver is prohibited altogether.

Similarly, out of a concern for practical implications once again, instead of providing for the right to counsel in the diversion context, the Subcommittee decided to limit the admissibility of statements made by juveniles in pre-adjudication proceedings. While there is constitutional ambiguity and significant variance nationwide as to whether a juvenile is entitled to the assistance of counsel in the pre-adjudication context, the amendments will balance the rights of juveniles with the government's interest in facilitating informal disposition of juvenile proceedings.

With regard to the Child Protective Act, the Subcommittee recognized that children over 12 should have their interests represented by an attorney that is acting as a zealous advocate. Currently, children are only unqualifiedly entitled to a guardian ad litem ("GAL") in child protection proceedings. However, the GAL's role is to protect the "best interests" of the child—not necessarily to advocate on behalf of the child's own wishes. The amendments to § 16-1614 will allow children to have a voice in the critical decisions being made about their lives in child protection actions.

The final piece of legislation is reflective of a Subcommittee finding that the most significant trend in nationwide approaches to public defense reform has been the movement

toward state oversight of the public defense function. As such, the Subcommittee concluded that authority should be statutorily delegated to an independent commission to promulgate and enforce certain standards for public defense attorneys, including statewide training and continuing legal education requirements, data reporting requirements, core provisions for contracts between counties and private providers of public defense services, qualification standards, and caseload and workload controls.

The Subcommittee agreed on the substance and form of the proposed legislation creating the commission and providing for its duties. After discussion, the ICJC determined that the appropriate action was not to pursue passage of this proposed legislation, but rather to support the creation of an interim legislative committee to examine potential means of reforming Idaho's public defense system. During the 2013 legislative session, the Idaho legislature passed House Concurrent Resolution 026, establishing that interim legislative committee. Thereafter, the Subcommittee identified four critical areas that it recommends the ICJC ask the interim committee to consider: (1) the structure and organization of indigent defense delivery; (2) the oversight and accountability of indigent defense delivery; (3) the mechanisms, standards, and funding for training and education for "defending attorneys" as defined in Idaho Code § 19-851(1); and (4) long-range planning for stable and ongoing funding of indigent defense delivery.

Lastly, the Subcommittee has recognized that one cost of maintaining the status quo is the potential for litigation. The state of Idaho has made, and the Subcommittee believes, it should continue to make improvements in the delivery of indigent defense services in Idaho. The Subcommittee believes that the best way to make reforms in Idaho is through the legislative process. The landscape of indigent defense reform across the country has, however, been shaped to some extent by lawsuits. The Subcommittee believes that the legislative interim committee should be aware of the potential for litigation from special interest groups, including those from outside the state, aimed at forcing change in Idaho.

IDAHO STATE PUBLIC DEFENSE COMMISSION

# PUBLIC DEFENSE COMMISSION

*The price of freedom is eternal vigilance.*
816 W. Bannock St., Suite 201
Boise, ID 83702
Tel (208) 332-1735 • Fax (208) 364-6147
mail@pdc.idaho.gov



December 1, 2014

Christopher Rich
Ada County Clerk
200 W. Front St., #1198
Boise, ID 83702

Dear Mr. Rich,

The State Public Defense Commission was established in the last legislative session as a self-governing agency in the executive branch of state government. Among other things, the Public Defense Commission has been charged with promulgating rules regarding uniform data reporting requirements for the annual reports submitted by the public defenders in each county. That data will include the caseload, workload, and expenditures of those attorneys handling indigent appointments. Those cases will include adult criminal cases, juvenile delinquent matters, child protection cases, guardianship representation, mental health commitments and some civil contempt cases.

Although we hope that eventually the statewide implementation of Odyssey will alleviate the burden on the counties of collecting and reporting this data, the Public Defense Commission has been charged with collecting and evaluating much of this data for the state legislature. I understand that county clerks are already constantly receiving information requests and surveys from various state agencies and state courts. It is not our desire to increase the burden on your office. Nevertheless, it is likely that you will be receiving requests from our office during the upcoming year.

Although this letter is not a request for information, I did want to let you know that you are likely to receive such requests in the upcoming year. I would hope that when we do send a request for information that you feel free to contact us with any questions you might have about the information we are seeking. Also, upon receiving a request, please let us know if you have already collected similar data and passed it on to another agency. I will be happy to track that information down and try to reduce your office's efforts.

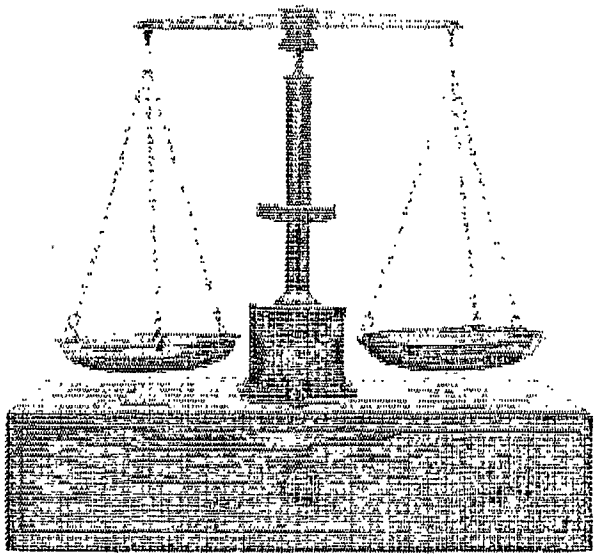
Let us know if there is anything we can do to make it easier for you to assist us in the task at hand. Likewise, if you have any ideas regarding data collection I would love to hear them.

Sincerely,

**EXHIBIT 4** 000332 20724

Ian H. Thomson
Executive Director

ABA



# TEN PRINCIPLES

## OF A PUBLIC DEFENSE DELIVERY SYSTEM

*February 2002*

**EXHIBIT 5**

# ABA Standing Committee
# On Legal Aid And Indigent Defendants

2001-2002

Chair

L. Jonathan Ross
Manchester, NH

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| | | |
|---|---|---|
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Terrence J. Brooks, Committee Counsel
Beverly Groudine, Associate Committee Counsel
Shubhangi Deoras, Assistant Committee Counsel
Janice Jones, Program Manager
Michaeline Glascott, Administrative Assistant

# TEN PRINCIPLES

## OF A PUBLIC DEFENSE DELIVERY SYSTEM

*February 2002*

Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.

# INTRODUCTION

The *ABA Ten Principles of a Public Defense Delivery System* were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992), which can be viewed on-line (black letter only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at http://www.abanet.org/crimjust/home.html.

# ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defendants is grateful to everyone assisting in the development of the *ABA Ten Principles of a Public Defense Delivery System.* Foremost, the Standing Committee acknowledges former member James R. Neuhard, Director of the Michigan State Appellate Defender Office, who was the first to recognize the need for clear and concise guidance on how to design an effective system for providing public defense services. In 2000, Mr. Neuhard and Scott Wallace, Director of Defender Legal Services for the National Legal Aid and Defender Association, jointly produced a paper entitled "The Ten Commandments of Public Defense Delivery Systems," which was later included in the Introduction to Volume I of the U.S. Department of Justice's Compendium of Standards for Indigent Defense Systems. The *ABA Ten Principles of a Public Defense Delivery System* are based on this work of Mr. Neuhard and Mr. Wallace.

Special thanks go to the members of the Standing Committee and its Indigent Defense Advisory Group who reviewed drafts and provided comment. Further, the Standing Committee is grateful to the ABA entities that provided invaluable support for these Principles by co-sponsoring them in the House of Delegates, including: Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Services. We would also like to thank the ABA Commission on Homelessness and Poverty and the ABA Juvenile Justice Center for their support.

L. Jonathan Ross
Chair, Standing Committee on
Legal Aid and Indigent Defendants

# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

*Black Letter*

1 The public defense function, including the selection, funding, and payment of defense counsel, is independent.

2 Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

3 Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

5 Defense counsel's workload is controlled to permit the rendering of quality representation.

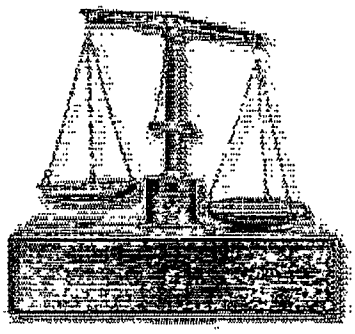
6 Defense counsel's ability, training, and experience match the complexity of the case.

7 The same attorney continuously represents the client until completion of the case.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

9 Defense counsel is provided with and required to attend continuing legal education.

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.



# ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

*With Commentary*

**1** The public defense function, including the selection, funding, and payment of defense counsel,[1] is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.[2] To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.[3] Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.[4] The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.[5]

**2** Where the caseload is sufficiently high,[6] the public defense delivery system consists of both a defender office[7] and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.[8] The appointment process should never be *ad hoc*,[9] but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.[10] Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.[11]

**3** Clients are screened for eligibility,[12] and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request,[13] and usually within 24 hours thereafter.[14]

**4** Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.[15] Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.[16] To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.[17]

**5** Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.[18] National caseload standards should in no event be exceeded,[19] but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.[20]

6 Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.[21]

7 The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.[22] The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.[23] Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.[24] Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,[25] and separately fund expert, investigative, and other litigation support services.[26] No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.[27] This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9 Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.[28]

10 Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff), assigned counsel,or contract defenders should be supervised and periodically evaluated for competence and efficiency.[29]

# NOTES

[1] "Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.

[2] National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "NSC"], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA"], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter "Assigned Counsel"], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter "Contracting"], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter "Model Act"], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties"], Standard 2.1(D).

[3] NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter "ABA Monitoring"], Standard 3.2.

[2] Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

[5] ABA, *supra* note 2, Standard 5-4.1

[6] "Sufficiently high" is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

[7] NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

[8] ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[9] NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[10] ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

[11] NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

[12] For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

[13] NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

[14] NSC, *supra* note 2, Guideline 1.3.

[15] American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter "ABA Defense Function"], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter "Performance Guidelines"], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

16 NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

17 ABA Defense Function, *supra* note 15, Standard 4-3.1.

18 NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).

19 Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should "reflect" (NSC Guideline 5.1) or "under no circumstances exceed" (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). *See also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter "Death Penalty"].

20 ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter "Appellate"], Standard 1-F.

21 Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.

22 NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).

23 NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

24 ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

25 NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim.*

26 ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

27 ABA Defense Function, *supra* note 15, Standard 4-1.2(d).

28 NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

29 NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

For More Information or To Order Publications, Contact Staff at:
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Defending Liberty
Pursuing Justice

# Public Defense Commission
# FY 2015 ANNUAL BUDGET REPORT

| [A] | [B] | [C] | [D] | [E] | [F] |
|---|---|---|---|---|---|
| | FY 2015 Actual | | | | Extrapolated |
| | Legislative Appropriations | Actual Exp. July -June | % of Allocation | Monthly Estimate | (Full 12-mo.) Expenses |
| **SALARY & BENEFITS** | **$119,800** | **$76,645** | **64%** | **$8,516** | **$116,770** |
| Executive Director-Total | | $67,001 | | | $100,211 |
| Executive Director-Salary | | $48,545 | | $6,000 | $71,996 |
| Admin. Asst.-Total | | $9,735 | | | $16,558 |
| Admin. Asst.-Salary | | $8,858 | | $1,235 | $15,128 |
| **OPERATING COSTS** | **$70,200** | **$39,822** | **57%** | **$1,971** | **$32,843** |
| **Rent/Utilities** | | **$7,708** | **19%** | **$924** | **$10,439** |
| Rent | | $6,302 | | $766 | $8,654 |
| Parking | | $1,260 | | $140 | $1,574 |
| Other (Conf. Rm. Space) | | $115 | | $15 | $180 |
| Assesment/Taxes | | $31 | | $3 | $31 |
| **Agency Services** | | **$2,323** | **6%** | **$271** | **$3,304** |
| Accounting (DFM) | | $936 | | $104 | $1,248 |
| IT Services (CIO) | | $1,387 | | $167 | $2,056 |
| Legal Services (AG) | | $0 | | $0 | $0 |
| **Communications** | | **$690** | **2%** | **$93** | **$1,155** |
| Postal & Mail | | $244 | | $35 | $418 |
| Phone/Fax | | $407 | | $58 | $699 |
| Email | | $39 | | | $39 |
| **Employee Development** | | **$4,061** | **10%** | **$332** | **$4,593** |
| Memberships | | $615 | | | $615 |
| Publications/Subscriptions | | $2,096 | | $332 | $3,978 |
| Training (CLE/Conferences) | | $1,350 | | | |
| **Administrative Costs** | | **$2,462** | **6%** | **$352** | **$3,129** |
| Copies/Copier | | $1,475 | | $211 | $2,529 |
| Office Supplies | | $987 | | $141 | $600 |
| **Travel** | | **$9,407** | **24%** | **$852** | **$10,223** |
| *Commissioners* | | *$4,752* | | *$335* | *$4,017* |

**EXHIBIT 6**

| | FY 2015 Actual | | | | Extrapolated (Full 12-mo.) Expenses |
|---|---|---|---|---|---|
| | Legislative Appropriations | Actual Exp. July -June | % of Allocation | Monthly Estimate | |
| Airfare | | $1,070 | | | |
| Other | | $3,682 | | $335 | $4,017 |
| *Executive Director* | | *$4,655* | | *$517* | *$6,206* |
| Airfare | | $1,707 | | $190 | $2,276 |
| Other | | $2,948 | | $328 | $3,931 |
| **Office Equipment** | | **$13,171** | **33%** | | |
| Furniture | | $6,994 | | | |
| Computer/Electronics | | $3,271 | | | |
| Misc. (signs, decor) | | $1,454 | | | |
| Software | | $1,452 | | | |
| | | | | | |
| **TRUSTEE & BENEFIT PAYMENTS** | **$110,000** | **$89,401** | **81%** | | |
| ***NAPD Membership*** | | ***$3,680*** | | | |
| ***Juvenile Training*** | | ***$7,806*** | | | |
| Facilities | | $731 | | | |
| Airfare/Milage | | $2,698 | | | |
| Meals | | $1,262 | | | |
| Lodging | | $1,245 | | | |
| Other | | $1,869 | | | |
| ***Capital Conference*** | | ***$24,802*** | | | |
| Facilities | | $281 | | | |
| Airfare/Milage | | $12,436 | | | |
| Meals | | $2,612 | | | |
| Lodging | | $7,404 | | | |
| Other | | $2,069 | | | |
| ***Defender Summit*** | | ***$53,113*** | | | |
| Facilities | | $2,418 | | | |
| Airfare/Milage | | $18,894 | | | |
| Meals | | $8,812 | | | |
| Lodging | | $18,000 | | | |
| Other | | $4,989 | | | |
| **TOTAL** | **$300,000** | **$205,868** | **69%** | | |

# FY2015 Trustee & Benefits Allocations

| | |
|---|---|
| **NAPD Memebership** | **$ 3,680.00** |

## Juvenile Public Defense Conference

| | | | | | | |
|---|---|---|---|---|---|---|
| Number of Registered Attendees | | 23 | Actual Attendees | 22 | Presenters | 6 |
| | | | | *(4) Reimb* | | |
| **Expense Breakdown** | | | **Total Cost** | **Cost per Attendee** | **Cost Per Presenter** | |
| Honorariums | | | **$ 1,300.00** | | | |
| Facility Costs | | | **$ 731.40** | | | |
| Materials | | | **$ 322.03** | | | |
| Catering | | | **$ 747.80** | | | |
| Lunch | $262.50 | | | $8.75 | | |
| Refreshments/Snacks | $485.30 | | | $16.18 | | |
| Travel | Attendees | Presenters | | | | |
| Lodging | $788.50 | $456.50 | **$ 1,245.00** | $35.84 | $76.08 | |
| Per Diem | $186.00 | $328.60 | **$ 514.60** | $8.45 | $54.77 | |
| Car Rental/Parking | $32.00 | $214.94 | **$ 246.94** | $1.45 | $35.82 | |
| Airfare/Mileage | $928.72 | $1,769.60 | **$ 2,698.32** | $42.21 | $294.93 | |
| **Total Cost of Juvenile Conference** | | | **$ 7,806.09** | $112.89 | $461.61 | |

## Public Defense Summit

| | | | | | | |
|---|---|---|---|---|---|---|
| Number of Registered Attendees | | 142 | Actual Attendees | 133 | Presenters | 16 |
| | | | | *(58) Reimb* | | *(6) Reimb* |
| **Expense Breakdown** | | | **Total Cost** | **Cost per Attendee** | **Cost Per Presenter** | |
| Honorariums | | | **$ 400.00** | | | |
| Facility Costs | | | **$ 2,417.50** | | | |
| Materials | | | **$ 1,859.98** | | | |
| **Catering** | | | **$ 7,286.50** | | | |
| June 4th Breakfast | $630.00 | | | $6.30 | | |
| June 4th Lunch | $1,147.50 | | | $7.65 | | |
| June 4th Banquet | $2,224.00 | | | $19.86 | | |
| Refreshments/Snacks | $535.00 | | | $3.57 | | |
| June 5th Breakfast | $630.00 | | | $6.30 | | |
| June 5th Lunch | $1,147.50 | | | $7.65 | | |
| June 5th Dinner | $497.50 | | | $9.95 | | |
| Refreshments/Snacks | $475.00 | | | $3.17 | | |
| Travel | Attendees | Presenters | | | | |
| Lodging | $17,406.09 | $594.00 | **$ 18,000.09** | $130.87 | $37.13 | |
| Per Diem | $1,320.50 | $205.10 | **$ 1,525.60** | $9.93 | $12.82 | |
| Car Rental/Parking | $2,187.81 | $541.55 | **$ 2,729.36** | $16.45 | $33.85 | |
| Airfare/Mileage | $15,985.01 | $2,908.86 | **$ 18,893.87** | $120.19 | $181.80 | |
| **Total Cost of Public Defender Summit** | | | **$ 53,112.90** | $341.88 | $265.59 | |

## Capital Defense Seminar

| Number of Registered Attendees | 31 | | Actual Attendees | 32 | Presenters | 8 |
|---|---|---|---|---|---|---|
| | | | | *(23) Reimb* | | |
| **Expense Breakdown** | | | **Total Cost** | **Cost per Attendee** | **Cost Per Presenter** | |
| Honorariums | | | $ - | | | |
| Facility Costs | | | $ **281.25** | | | |
| Materials | | | $ **267.91** | | | |
| Catering | | | $ **289.85** | | | |
| Refreshments/Snacks | $289.85 | | | $9.66 | | |
| Travel | Attendees | Presenters | | | | |
| Lodging | $6,269.76 | $1,134.00 | $ **7,403.76** | $195.93 | $141.75 | |
| Per Diem | $1,507.50 | $814.34 | $ **2,321.84** | $47.11 | $101.79 | |
| Car Rental/Parking | $934.54 | $866.54 | $ **1,801.08** | $29.20 | $108.32 | |
| Airfare/Mileage | $7,951.63 | $4,484.49 | $ **12,436.12** | $248.49 | $560.56 | |
| **Total Cost of Capital Seminar** | | | $ **24,801.81** | $530.39 | $912.42 | |

| | | |
|---|---|---|
| **Trustee & Benefits Allocation** | $ | **110,000.00** |
| **Total Trustee & Benefits Spent** | $ | **89,400.80** |
| **Amount Remaining** | $ | **20,599.20** |

# IDAHO STATE PUBLIC DEFENSE COMMISSION
# STRATEGIC PLAN
## FY 2016 through FY 2019

## *MISSION*

The mission of the State Public Defense Commission is to seek and preserve freedom for all by vigorously safeguarding Constitutional rights. In the words of Thomas Jefferson, "The price of freedom is eternal vigilance."

## *VISION*

The State Public Defense Commission hopes to serve Idaho by

(1) Serving as a clearing house of information regarding indigent defense for all relevant stakeholders;
(2) Maintaining standards to ensure that attorneys have adequate training and resources to fulfill their Sixth Amendment obligations;
(3) Promulgating rules for attorney training and data collecting; and
(4) Informing the legislature of any Sixth Amendment issues in the State.

## *GOALS*

FIRST GOAL **The Public Defense Commission will strive to Maintain or Improve the Performance of Individual Defending Attorneys.**

**Objective 1: The Commission will seek to promulgate rules regarding training and Continuing Legal Education (CLE) requirements for defending attorneys where representation is provided by statute or required by the state or federal constitution in Fiscal Year 2017.**

STRATEGY 1: The Commission will include training and CLE requirements in its suggested core contract terms for distribution in the Fall of 2015.

STRATEGY 2: The Commission will propose administrative rules setting out the practice and experience required in order to qualify for a contract or to serve as a public defender.



**EXHIBIT 7**

PERFORMANCE MEASURE: The Commission will undertake the negotiated rule-making process in June and July of 2016, allowing a proposed rule to be submitted to the Department of Administration by the end of August of 2016. With initial publication and comment period slated for October of 2016, a pending rule can be voted on by the Commission at the beginning of November of 2016, in time for publication and presentation to the legislature.

**Objective 2: The Commission will strive to ensure that defending attorneys are qualified to represent indigent clients where representation is provided by statute or under the state or federal constitution.**

STRATEGY 1: The Commission will include minimum qualification and experience standards in certain cases in suggested core contract terms offered to the counties and defending attorneys.

STRATEGY 2: The Commission will make recommendations to the legislature, by statute or rule, to establish minimum qualifications and experience standards in certain cases.

PERFORMANCE MEASURE: Proposed legislation should be written and ready for presentation to the Legislature by January of 2016. If presented as for adoption by rule, the Temporary Rules process will need to be followed and all drafted rules must be submitted to the Department of Administration by the end of August 2015 in order to be published in the October 2015 Bulletin.

**Objective 3: The Public Defense Commission will provide access to meaningful, useful, and relevant trainings to defending attorneys.**

STRATEGY 1: In the immediate future, the Public Defense Commission will host and conduct CLE trainings paid out of Trustee-Benefit payment funds.

PERFORMANCE MEASURE: In each Fiscal Year, the Commission should present substantive trainings for defending attorneys. Those trainings should include emphasis on training attorneys to handle juvenile cases, child protection actions, criminal cases, and capital training.

BENCHMARK: The Commission will allocate as much of the Trustee-Benefit payments as possible in each fiscal year; and the Commission will strive to reach more than 190 defending attorneys in Fiscal Year 2016.

STRATEGY 2: The Public Defense Commission will explore the possibility of partnering with other Idaho and national organizations to provide the most effective trainings.

BENCHMARK: In Fiscal Year 2016 the Commission will determine dates of IPA conferences through the next eighteen months, and conduct coordinating meeting with members of the IACDL subcommittee and with Federal Defenders of Idaho

STRATEGY 3: The Public Defense Commission will seek to offer scholarships, financial subsidies, or incentives for defending attorneys to avail themselves of training programs and opportunities not offered by the Commission.

PERFORMANCE MEASURE: The Commission will propose qualifications for scholarships and trustee-benefit payments by temporary rule by late August of 2015, in time for publication in the October 2015 Bulletin and presentation to the legislature for approval in January of 2016.

BENCHMARK: Final adopted rules will be in place for Fiscal Year 2017.

STRATEGY 4: The Commission will provide online and remote training resources through webinars and the NAPD-MyGideon library.

PERFORMANCE MEASURE 1: The Commission will conduct a Winter and Summer drive for defending attorneys to join NAPD in each Fiscal Year.

BENCHMARK: The Commission will seek to increase NAPD membership above 186 attorneys in Fiscal Year 2016.

PERFORMANCE MEASURE 2: The Commission will create a web-page featuring Idaho CLE credit courses offered through NAPD archived webinars during FY 2016.

STRATEGY 5: The Commission will seek additional funding sources through grants and partnerships.

## SECOND GOAL — The Public Defense Commission will seek or explore systemic recommendations for the provision of indigent defense.

**Objective 1: The Commission will thoroughly explore or review other systems, models or alternatives by the end of Fiscal Year 2016.**

STRATEGY 1: The Commission will gather information regarding all models for the provision of public defense.

STRATEGY 2: The Commission will seek input from defending attorneys and boards of county commissioners in order to determine their ideas and suggestions regarding the provision of indigent defense.

PERFORMANCE MEASURE: The Commission will continue to meet with defending attorneys and county commissions in every county, either one-on-one or through public defender events and Idaho Association of Counties conferences.

**Objective 2: The Commission will obtain sufficient information and perspective about Idaho's current circumstances to develop recommendations.**

STRATEGY 1: The Commission will coordinate with the Idaho Supreme Court to determine what information will be collected through the Odyssey Program.

BENCHMARK: Odyssey will be fully implemented in every county by the Summer of 2017, and the Commission will be ready to begin collecting its data through organized custom reports. A year of data collection will then be collected through Fiscal Year 2018.

STRATEGY 2: The Commission will identify any additional data that needs to be collected by the defending attorneys for the purpose of annual reporting.

PERFORMANCE MEASURE 1: Provide the counties and defending attorneys a suggested template report for use across the State by the end of the county's fiscal year in September of 2015.

PERFORMANCE MEASURE 2: Engage in the negotiated rule-making process in June of 2016 in order to construct rules regarding the statutory reporting requirements of defending attorneys. That will allow for submission in August of 2016, for publication in October and adoption in November of the same year.

STRATEGY 3: The Commission will develop a mechanism to gather input from defending attorneys regarding their unique circumstances.

STRATEGY 4: The Commission will collaborate with the Idaho Association of Counties to gather information for actual and projected expenditures for public defense.

**Objective 3: The Commission will make recommendations for workload standards.**

STRATEGY 1: The Commission will review and select a time-management software program that would be recommended for defending attorneys in order to collect the data necessary to develop workload recommendations.

STRATEGY 2: Identify the cost of a pilot program and explore funding solutions for that program.

STRATEGY 3: Identify the counties that would serve as a pilot participant to track attorney time.

STRATEGY 4: Identify how the data is going to be collected

PERFORMANCE MEASURE: The Commission will have collected meaningful workload data before the end of Fiscal Year 2019.

**Objective 4: The Commission will identify the model that most appropriate meets the needs of Idaho, and indigent defendants according to the applicable constitutional standards.**

STRATEGY 1: The Commission will ensure that Objectives 1, 2, and 3 have been satisfactorily completed.

STRATEGY 2: The Commission will identify workload standards, taking into account all external factors, including but not limited to: the geography of the county, the proximity of attorneys to clients and the courts, and travel distances required.

## *EXTERNAL FACTORS*

This strategic plan represents an initial attempt to identify those specific areas where the legislature has granted authority to the Commission. Nearly the entirety of the strategic plan is contingent on the further direction and approval of the Idaho Legislature. The existence of the Joint Interim Committee for Public Defense Reform means that the authority and scope of the Commission's charge is subject to change depending on the needs and decisions of the policymakers. The Commission is ready and willing to adapt with the shifting landscape and will revisit the strategic plan as often as is necessary in order to ensure responsiveness to the needs of Idaho.

# MEETING MINUTES

## STATE PUBLIC DEFENSE COMMISSION

*Date* | *time* 4/7/2015 8:30 AM | *Location* Canyon County Administration Building, 1st Floor Public Conference Room, 111 North 11th Avenue, Caldwell, ID

*Meeting* Commission Meeting—Model Contract Terms

### Commission members present

Molly Huskey, Chair, District Judge | Darrell Bolz, Vice Chair, Juvenile Justice Comm. | Kimber Ricks, Madison Co. Comm. | William Wellman, Defense Attorney

Ian Thomson, Exec. Dir. | Nichole Devaney, Admin. Asst.

### Commission members absent

Chuck Winder, Senator | Christy Perry, Representative | Sara Thomas, SAPD (arrived late at 12:00pm)

### Others present

None

| | Item | Responsible |
|---|---|---|
| 1. | Welcome and Call to Order:<br>Called to order at 8:35am | Huskey |
| 2. | Approval of Meeting Minutes (3/3/15):<br>Mr. Wellman moved to adopt the minutes as presented, Mr. Bolz seconded, and the motion unanimously passed with one small typographical correction. | |
| 3. | Determination of who will attend the PDC Presentation to I.A.C. on June 11th:<br>Judge Huskey stated that it was not necessary for all members to attend. Ms. Thomas, Comm. Ricks and ED Thomson will already be in Coeur d'Alene, and suggested that either she or Mr. Wellman complete the group. Comm. Ricks suggested that anything the Commission wanted to talk about to better explain its purpose would be helpful for the audience. Judge Huskey recommended taking 30 minutes or so to go over the contract terms and then allow 30 minutes or so for questions. Comm. Ricks agreed, stating that the commissioners rely heavily on county staff and supporters to draft new contracts. Judge Huskey recommended the contracts terms discussion be the topic for the full hour and a half allotment. ED Thomson offered to forward an email in advance to all the Commissioners asking for suggested questions/concerns. Judge Huskey recommended tailoring the email to specify questions about contracts. Comm. Ricks mentioned that it would be helpful if the PDC touched on the issue of how the determination of who qualifies for a public defender is made. Mr. Bolz noted that it might be helpful for model contract terms to include a definition of a "flat fee contract" or that this issue be addressed with the IAC. Comm. Ricks reminded the PDC that there is clear division between some counties. The PDC needs to remember the differences between those counties with full- | |

| Item | Responsible |
|---|---|

time commissioners, and in-house public defender offices. He expressed a desire that the PDC make an attempt and trying to mend some of those fences.

4. Suggestions for use of excess Operating Budget FY 2015:

At this time the anticipated operating funds available total approximately $25,000. Mr. Wellman referenced the Executive Leadership training discussed in the previous meeting, and inquired whether that was something the Commission wanted to use the money toward. ED Thomson referenced an email he forwarded to all the institutional office heads stating that he had only received interest from one person. Judge Huskey suggested offering leadership training to some of the up and coming PD's who show interest in leadership. Comm. Ricks commented that selection of individuals should be approached with caution so as not to give any appearance of favoritism. Judge Huskey proposed that she and ED Thomson get together over the next month and select a handful of potential individuals and establish a potential cost.

ED Thomson suggested that some of the funds could be used toward educating the Commission, such as bringing out David Carroll from the Sixth Amendment Center to make a presentation to the group. He recommended asking him to come for the June meeting. Judge Huskey and Mr. Wellman agreed that would be a good idea. ED Thomson will contact him to see what his availability is in June. Comm. Ricks asked if this type of training should be open to the attendance of some of the interim committee members. Judge Huskey liked that idea and recommended getting Mr. Carroll's availability and then the Commission could determine which other individuals would benefit from a presentation that day.

Mr. Bolz stated that if some money is reverted back to the general fund this year, it would not likely affect the Commissions budget next year. The legislature understands the Commission is new and will need a year to establish itself and its expenses.

5. Model Contract Terms: — Huskey/Wellman/ Ricks

The Commission then undertook a close examination of the contract terms.

Case Types: Mr. Wellman suggested that the PDC use an inclusive approach that would strive to identify any case where a person's liberty is restricted. Mr. Wellman suggested that this list be incorporated with some verbiage within these terms to help Commissioners. ED Thomson suggested including direct appeals for all cases, whether that be by contract or through the SAPD's services. There was also additional discussion of including appeals of juvenile delinquency matters.

Reports and Inspections: The Commission will recommend that annual reporting occur at the end of the county's fiscal year, and that it be submitted by the last day of October. The specifics of what that annual report should include were discussed and refined. That information must include all of those attorneys that provide services under the contract, regardless of whether they are the named attorney under the contract.

Caseload Reports: There were suggestions that the proposed wording be modified to reflect the annual reporting requirement and to include the case types already included.

Expenditure Reports: Suggestions were made to reflect the annual reporting and to include the case types. ED Thomson suggested adding language to distinguish between extraordinary expenses being spent out of original budget appropriations vs.

supplemental funding coming from the court. Commissioners generally agreed that the PDC should develop a standard form or report to be used by reporting attorneys, and that there would be a significant benefit in having all counties use the same form.

Other: There was some discussion around the bar complaint process. It was determined that the requirements would be triggered by bar discipline instead of a complaints.

Performance Expectations to be Considered: Mr. Wellman opened it up to the Commission for direction as to whether the ABA's Ten Principles of a Public Defense Delivery System, their guidelines for the defense function, or the NLADA Performance Guidelines should be incorporated or used in the terms of the contract. He asked, how the Commission might refer to them in a model contract. What burden would they place upon the counties? There was general agreement amongst the Commissioners that the ABA Ten Principles, along with part of the preamble, should be a mandatory provision of the contract. The Ten Principles could be attached as an addendum. There was a discussion about state and county exposure to liability once standards and aims are adopted. Ms. Thomas reminded the members that any proffered terms will be presented to the Legislature for adoption; if the counties then choose not to adopt them then the state and or county may open themselves up to liability (the state for not making them mandatory, and the county for acting contrary to state recommendation).

There was also a discussion of the NLADA Guidelines compared to the ABA Guidelines for the Defense Function Standards. The Commissioners generally agreed that the NLADA Guidelines were (1) more recent, (2) incorporated most of the ABA guidelines, and (3) were more relevant to indigent defense practice. At the suggestion of Ms. Thomas and Chair Huskey, Thomson will order a bound volume of the NLADA guidelines for each county and member of the interim committee. There was general agreement to remove all caseload/workload issues from the initial model terms. Instead, attorneys should be guided by the ABA Ethics Opinion 06-441, which would be attached as an addendum.

In discussing caseload, the issue of capital cases came up. Chair Huskey wondered whether it would be instructive for the members of the Commission if she were to arrange a meeting with J. Burdick, and obtain the court's interpretation of 18-4004A, and whether a First Degree murder case is considered a death penalty case in the absence of a filing of the Notice of Intent to Seek Death, before the statutory 60-day period after arraignment has been satisfied, or where that period has been extended by an agreement of all parties. Should the capital standards apply in the interim? Otherwise, the defense team is at a significant disadvantage and very behind if that decision is made months later.

Other Proposed Meetings: Ms. Thomas pointed out that the PDC will be going through the Executive Legislative System. Any proposed model contract terms need to go through the Governor's office, and reviewed by David Hensley or Mark Warbus. Chair Huskey would like to sit down with Governor's Office in advance of submitting any rules. Ms. Thomas offered to arrange that meeting. Comm. Ricks also offered to help arrange the meeting with Mr. Warbus. The PDC's goal would be to use the June IAC meeting as the start of a comment period, with feedback incorporated into the terms by September. (The IAC fall meeting is to be held from September 28-30 at the Grove Hotel.)

It was also suggested that Chair Huskey and Dan Chadwick have a meeting with Comm. Yzaguirre (Ada County), to find out what are their concerns. A meeting could be

| Item | Responsible |
|---|---|

set-up for early May. There was an inquiry whether the IAC, and Dan Blocksom, could be used to assist counties in constructing model contract terms until the PDC is able to do so.

Ms. Thomas made a motion for the PDC to ask for another FTE-attorney position next year, who could work with the counties to create RFP bids, and to manage, write and construct contracts. Mr. Bolz seconded the motion. Comm. Ricks inquired as to whether it was premature, and whether anything similar already existed. Ms. Thomas explained that such an attorney would be an expert on the issue, and would constitute an actual service where the state (through the PDC) could off-set a cost to the counties. Comm. Ricks asked whether the PDC was appointing itself to act in that capacity. Ms. Thomas indicated that participation would not be mandatory. Chair Huskey added that the attorney could also help arrange and develop PD trainings, and data reporting. Such a position would require additional legislation. The vote in favor of the motion was unanimous (five present).

Grounds to renegotiate contract: Ms. Thomas believes there needs to be a clearer standard, other than "significant changes", when a defending attorney is justified in renegotiating a contract. The Commission should look for a definition of what constitutes a "significant change," and should probably include a definition of materiality. Ms. Thomas also believes there needs to be an "out" provision, like in Blaine County, in the event any case exceeds 60 hours of attorney-time. In that event, the attorney would have to notify the county, and then estimate the time required. In that event, the attorney would then be paid by the hour. The administrative district judge would then make a determination of the appropriate number of hours and the reimbursement rate, under seal.

Qualifications and Case Requirements: Many of the remaining terms had already been taken up in the previous contract terms meeting on January 28th. There were some adjustments suggested when addressing capital cases. There was also lengthy discussion surrounding the experience qualifications required for juvenile representation, and whether the same case severity distinctions should be made when distinguishing between certain felonies and delinquency cases. The Commission generally agreed that serious adult felonies would be divided if the possible exposure was 15 years or greater, or where certain mandatory minimums applied. Juvenile cases need to be distinguished between whether the cases are waivable and non-waivable crimes (whether the cases are transferrable into adult court). There was considerable discussion as to what qualifications should be necessary in those types of cases. There was general agreement that any resulting model contract term should parallel the statute that discusses transferring jurisdiction from juvenile to adult court.

6. Next Meeting: May 5, 2015, 1 – 5pm

Agenda Items for Next Meeting:

Review and finalize model contract terms; should discuss IAC presentation in June; follow-up on David Carroll meeting in June; postpone discussion on strategic plan and caseload/workload studies.

Proposed to meet again at Canyon County Administration Building.

7. Adjournment — Huskey

Attachments:

Proposed Model Contract Terms (Rough Draft)

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA**

| | |
|---|---|
| TRACY TUCKER, et al., on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. MOLLY HUSKEY, *et al.*, in their official capacities as members of the Idaho State Public Defense Commission,<br><br>Defendants. | **Case No. CV OC 1510240**<br><br>**DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANTS** |

Pursuant to the court's Order Regarding Discovery, dated October 19, 2015, Defendants answer Plaintiffs' First Set of Requests for Admission as follows. Defendants deny each request except as specifically admitted below.

///



**EXHIBIT 9**

## REQUESTS FOR ADMISSION

Please admit the following:

**REQUEST FOR ADMISSION 1:** The Idaho Criminal Justice Commission (CJC) was created by Executive Order in 2005, and operates under the supervision of the Governor.

**ANSWER TO REQUEST FOR ADMISSION 1:** Defendants admit that on June 16, 2005, Governor Kempthorne issued Executive Order No 2005-06, which "establish[ed] the Idaho Criminal Justice Commission." See Idaho Administrative Bulletin Volume (I.A.B. Vol.) 05-8, pages 15-16 (August 3, 2005); 2006 Idaho Session Laws (I.S.L.), pp. 1430-1432. Executive Order 2005-06 was repealed and replaced by Executive Order 2005-17, which was in turn repealed and replaced by Executive Order 2006-29. By its terms, that Executive Order ceased to be effective no later than four years later and is no longer in effect. Governor Otter continued the Idaho Criminal Justice Commission through Executive Order 2011-11, dated July 19, 2011, and Executive Order 2015-10, dated September 23, 2015. Defendants deny that the Idaho Criminal Justice Commission "operates under the supervision of the Governor." The currently effective executive order, Executive Order 2015-10, does not provide for the Governor to supervise the Idaho Criminal Justice Commission, and it authorizes the Governor to appoint only a minority of the Commission's members.

**REQUEST FOR ADMISSION 2:** The purpose of the CJC is to provide policy-level direction to State officials and to promote the efficient and effective use of resources, based on best practices or evidence-based practices, for matters related to the State's criminal justice system.

**ANSWER TO REQUEST FOR ADMISSION 2:** Defendants deny this Request for Admission because it is inconsistent with Executive Order 2015-10, which recites the following purpose for the CJC:

> 2. The purpose of the Commission shall be to provide policy-level direction and to promote efficient and effective use of resources, based on a data-driven approach and evidenced-based practices, for matters related to the State's criminal justice system.

REQUEST FOR ADMISSION 3: The CJC is comprised of at least one representative from the executive, legislative, and judicial branches of Idaho's state government, and consists of 26 total members.

ANSWER TO REQUEST FOR ADMISSION 3: Defendants admit this Request except for the fact that Executive Order 2015-10 provides that the CJC "shall consist of 25 members," and recognizing that from time to time there can be vacancies in the membership of the CJC that, until filled, will leave the CJC with fewer than 25 total members.

REQUEST FOR ADMISSION 4: Among other required members, the CJC must include a representative from the Governor's office; the state Attorney General or his designee; two members from the Idaho Senate; two members from the Idaho House of Representatives; the Administrative Director of the Courts; three representatives from the judiciary; and one representative from the Office of the Idaho State Appellate Public Defender.

ANSWER TO REQUEST FOR ADMISSION 4: Defendants admit this request. See Executive Order 2015-10.

REQUEST FOR ADMISSION 5: In 2009, the CJC formed a Public Defense Subcommittee (Subcommittee) tasked with developing specific recommendations for improvement of Idaho's public defense system.

ANSWER TO REQUEST FOR ADMISSION 5: Defendants admit that the CJC formed a subcommittee in 2009 tasked with evaluating the public defender system and bringing recommendations to the CJC.

REQUEST FOR ADMISSION 6: In 2011, Defendant Governor Otter issued Executive Order No. 2011-11, continuing and reaffirming the CJC's mandate.

ANSWER TO REQUEST FOR ADMISSION 6: Defendants admit that Governor Otter issued Executive Order No. 2011-11, "*CONTINUING THE IDAHO CRIMINAL JUSTICE COMMISSION.*" However, the continued CJC was differently constituted than the CJC established in 2005 (which had 22 members, not 26). Defendants deny that Executive Order 2011-11 "continu[ed] and reaffirm[ed] the CJC's mandate" because the Executive Order No. 2005-06's

Paragraph 2, clauses a through g, overlapped in part with Executive Order No. 2011-11's Paragraph 2, clauses a through e, but also differed in part in their directives to the CJC. Compare I.A.B. Vol. 05-8, pages 15-16 (August 3, 2005), 2006 Idaho Session Laws (I.S.L.), pp. 1431-1432, with I.A.B. Vol. 11-9, p. 31 (September 7, 2011); 2012 I.S.L., p. 1008.

REQUEST FOR ADMISSION 7: On May 24, 2013, after approximately three years of investigation, the Subcommittee issued a set of public defense reform recommendations to the CJC.

ANSWER TO REQUEST FOR ADMISSION 7: Defendants admit that on May 24, 2013, the CJC Public Defense Subcommittee adopted Recommendations of the Public Defense Subcommittee in a process summarized below:

> In 2009, the Idaho Criminal Justice Commission ("the Commission" or "ICJC") formed a Public Defense Subcommittee ("the Subcommittee") tasked with developing recommendations for improvement of Idaho's public defense system. In January of 2010, the National Legal Aid & Defender Association ("NLADA") released a report which suggested that Idaho is not adequately satisfying its Sixth Amendment obligations. For more than three years, the Subcommittee committed itself to identifying improvements to be made, and its efforts yielded four pieces of proposed legislation.

*See* http://icjc.idaho.gov/pubs/ICJC%20Recommendations%20of%20the%20Public%20Defense%20Subcommittee.pdf.

REQUEST FOR ADMISSION 8: Defendant Sarah B. Thomas became Chair of the CJC on or about May 30, 2013, and continues to serve in that capacity at present.

ANSWER TO REQUEST FOR ADMISSION 8: Defendants admit this request.

REQUEST FOR ADMISSION 9: In 2008, the CJC, along with the Idaho Juvenile Justice Commission, authorized the National Legal Aid and Defender Association (NLADA) to conduct a comprehensive evaluation of Idaho's trial-level indigent defense services.

ANSWER TO REQUEST FOR ADMISSION 9: Defendants admit that the CJC was aware that the NLADA intended to evaluate Idaho's trial-level indigent defense services. Defendants admit

that the CJC agreed to cooperate with the evaluation, but deny that the CJC authorized the evaluation by funding or permitting it. The NLADA funded the evaluation through a grant and did not need the CJC's permission to do it. Defendants deny that the NLADA evaluation was "comprehensive" because the NLADA sent evaluators to only seven of the 44 counties.

REQUEST FOR ADMISSION 10: The CJC identified seven counties to serve as a representative sample of indigent defense systems to be evaluated by the NLADA. These included Ada, Blaine, Bonneville, Canyon, Kootenai, Nez Perce, and Power Counties.

ANSWER TO REQUEST FOR ADMISSION 10: Defendants admit that a subcommittee of the CJC identified seven counties to serve as a representative sample for the NLADA evaluation, but deny that the full CJC selected or approved the sample counties.

REQUEST FOR ADMISSION 11: In January 2010, the NLADA released the results of its evaluation of trial-level indigent defense systems in Idaho, entitled "The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts."

ANSWER TO REQUEST FOR ADMISSION 11: Defendants admit that in January 2010 the NLADA released a document the cover of which was titled and subtitled "The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts" and "Evaluation of Trial-Level Indigent Defense Systems in Idaho."

REQUEST FOR ADMISSION 12: In its January 2010 report, the NLADA determined that none of the indigent defense systems in the sample counties were constitutionally adequate.

ANSWER TO REQUEST FOR ADMISSION 12: Defendants admit that the 2010 NLADA report stated: "NLADA finds that none of the public defender systems in the sample counties are constitutionally adequate." Page iii. Defendants deny the rest of this Request for Admission to the extent it implies that the counties involved were a statistically valid random sample of counties in Idaho or that the NLADA report is a "determination" that must be judicially accepted.

REQUEST FOR ADMISSION 13: The NLADA's January 2010 report was made available to and reviewed by representatives of the executive and legislative branches of Idaho state government, including Governor Otter.

ANSWER TO REQUEST FOR ADMISSION 13: Defendants admit that NLADA's January 2010 report was made available to members of the executive and legislative branches of Idaho State Government, including the named Defendants, who had the opportunity to review it. Defendants admit that the named defendants who are persons reviewed the report. Defendants neither admit nor deny which Legislative or other Executive officers "reviewed" the 2010 report because Defendants are not responsible for and do not monitor which other State officers did so.

REQUEST FOR ADMISSION 14: There are currently no statewide caseload standards for public defenders in Idaho.

ANSWER TO REQUEST FOR ADMISSION 14: Defendants admit this Request for Admission.

REQUEST FOR ADMISSION 15: There are currently no statewide performance standards for public defenders in Idaho.

ANSWER TO REQUEST FOR ADMISSION 15: Defendants deny this Request. United States Supreme Court decisions, Idaho Supreme Court decisions, Idaho Court of Appeals decisions, Idaho Supreme Court rules and State Bar Rules contain some performance standards which apply to all public defenders in Idaho. Defendants admit that there are no statewide statutory performance standards for public defenders in Idaho and no Idaho State Public Defense Commission rules with statewide performance standards for public defenders in Idaho.

REQUEST FOR ADMISSION 16: There are currently no specific statewide training requirements for public defenders in Idaho.

ANSWER TO REQUEST FOR ADMISSION 16: Defendants admit this Request for Admission except as qualified in this paragraph. Defendants note that Idaho State Bar Rules 400 through 408 require every attorney practicing in Idaho, including public defenders, to participate in continuing legal education (CLE), although that requirement does not require public defenders to take CLE specific of criminal defense. Defendants further note that Idaho Criminal Rule 44.3 contains Standards for Qualification of Appointed Counsel in Death Penalty Cases.

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REQUEST FOR ADMISSION 17: There is currently no statewide oversight of trial-level indigent defense services being provided to criminal defendants throughout the various counties.

ANSWER TO REQUEST FOR ADMISSION 17: Defendants admit this Request for Admission with the exception of Idaho Criminal Rule 44.3's standards for Qualification of Appointed Counsel in Death Penalty Cases.

REQUEST FOR ADMISSION 18: There is currently no requirement that public defenders report their individual caseloads to state officials or any court.

ANSWER TO REQUEST FOR ADMISSION 18: Defendants admit this Request for Admission with respect to reporting to State Executive or State Legislative Officers, but deny that there is no requirement to report to other officials or courts. Idaho Code § 19-864 requires all defending attorneys to "submit an annual report to the board of county commissioners and the appropriate administrative district judge showing the number of persons represented under [the Idaho Public Defense Act], the crimes involved and the expenditures . . . made in carrying out the responsibilities imposed by [the act]." Defendants object to this Request for Admission as unduly burdensome to the extent that it seeks information on whether any other Idaho judge has ever required a public defender to report his or her individual case load to the judge because that would require a survey of every one of the 45 current District Judges, all of the 88 Magistrate Judges, and over 60 Senior Judges, any of whom could be designated to hear criminal cases. Little purpose would be served by diverting these judicial officers from their normal duties to answer such a survey to determine whether one or more of them has ever asked a public defender to report his or her case load to the Court.

REQUEST FOR ADMISSION 19: Aside from the trustee benefit payments allocated to the Idaho Public Defense Commission (PDC) in 2014 to offer limited training for public defense attorneys around the state, the State of Idaho currently provides no funding for trial-level indigent defense services.

ANSWER TO REQUEST FOR ADMISSION 19: Defendants admit that the trustee benefit payments allocated to the Idaho Public Defense Commission (PDC) in 2014 to offer training for

public defense attorneys around the state is funding the State of Idaho currently provides for trial-level indigent defense services. Defendants deny that the funds are provided to offer "limited" training. There are no limits imposed on the PDC regarding the training it can provide with the funds. Defendants object to this Request for Admission as unduly burdensome to the extent that it seeks information on whether any defending attorney has applied for and received any State grant funding, which would be additional funding for trial-level indigent services.

REQUEST FOR ADMISSION 20: Pursuant to I.C. sec. 19-862, each board of county commissioners alone is responsible for appropriating enough money to deliver adequate public defense services to indigent defendants being prosecuted in their jurisdiction.

ANSWER TO REQUEST FOR ADMISSION 20: Defendants deny this Request for Admission. Idaho Code § 19-862(2) explicitly allows counties that establish and maintain an office of public defender to "accept private contributions for support of the office" of public defender in addition to the appropriations for support of the office for which they alone are responsible.

REQUEST FOR ADMISSION 21: County commissioners are not required to have any formal or informal training in the law.

ANSWER TO REQUEST FOR ADMISSION 21: Defendants admit Request for Admission 21.

REQUEST FOR ADMISSION 22: A survey conducted by the CJC in 2014 found that indigent defendants are represented by counsel at their initial appearance in only 5 of the 44 counties.

ANSWER TO REQUEST FOR ADMISSION 22: Defendants deny this request because it suggests that the CJC conducted a complete and accurate survey. Defendants believe the request may be referring to an informal e-mail poll a member of a CJC subcommittee conducted. Not every defending attorney was polled, and public defenders from only some counties responded, making any results of the informal poll incomplete and unreliable. Defendants are aware of no written report describing the informal poll and its results, which have not been presented to or reviewed by the CJC.

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REQUEST FOR ADMISSION 23: A significant number of public defenders in Idaho are not receiving adequate training hours in areas directly relevant to the representation of their indigent clients.

ANSWER TO REQUEST FOR ADMISSION 23: Defendants object to this request on the ground that the term "adequate training" is ambiguous and Defendants do not know what the Plaintiffs consider "adequate." Defendants admit that the PDC's initial assessment of the amount and source of the mandatory continuing legal education (CLE) credit hours obtained by public defenders in their current reporting period indicated that a significant number of public defenders in Idaho were not receiving adequate CLE training hours in areas directly relevant to the representation of their indigent clients. Defendants note that the PDC's initial assessment did not include other training the public defenders may have received. Since the PDC's initial assessment, the PDC has helped increase available training by joining public defenders to the National Association for Public Defense, which provides significant online resources. The PDC also has used its trustee benefit payment allocation to host and sponsor indigent defense attorney training conferences at little or no cost to the attending attorneys. Defendants believe the PDC's efforts have improved and will continue to improve the training Idaho's public defenders are receiving.

REQUEST FOR ADMISSION 24: According to a recent report by the Idaho Legislative Services Office regarding caseloads, public defenders in some counties are handling more than twice the number of cases they should be.

ANSWER TO REQUEST FOR ADMISSION 24: Defendants object to this Request for Admission because it is vague and does not identify the report. In addition, the notion of the number of cases a public defender "should be" handling is a subjective judgment not based on any adopted caseload standards in Idaho. Defendants also deny this Request for Admission to the extent that it may be referring to written materials presented to the 2014 Legislative Public Defense Reform Interim Committee. The website for the that 2014 Interim Committee contains links to a number of materials submitted to the Interim Committee and lists three Committee Staffers,

http://legislature.idaho.gov/sessioninfo/2014/interim/defense.htm, but none of the Staff materials that are linked to that website stated that public defenders in some counties are handling more than twice the number of cases that the public defenders should. If Plaintiffs are referring to materials other than those produced by the Legislative Services Office for the 2014 Legislative Public Defense Reform Interim Committee or are themselves inferring such a conclusion, they need to provide more information about what materials they are referring to in order to allow Defendants to admit or deny this Request.

REQUEST FOR ADMISSION 25: On any given day, there are hundreds, if not thousands, of individuals being prosecuted by the State of Idaho, who qualify for indigent defense services.

ANSWER TO REQUEST FOR ADMISSION 25: Defendants object to this Request for Admission because it is vague and because it would be unduly burdensome to answer. It is vague because the words "individuals being prosecuted" could refer to persons who are in court on "any given day" or to persons who have prosecutions pending on "any given day." The numbers would vary significantly depending upon which meaning these words have. It is further vague because "hundreds" might refer to any number from 200 on up. There is no way to know what the threshold for "hundreds" is. It is unduly burdensome because in order to answer this question for "any given day" one would have to know the actual number of defendants who qualify for indigent defendant services on every day of the year, presumably for several years, which would require reviewing the Court dockets for every county in the State and further determining which criminal defendants are eligible for indigent defendant services to determine whether there are "hundreds" of them on each of those days.

REQUEST FOR ADMISSION 26: The majority of individuals charged with either a misdemeanor or felony in Idaho are alleged to have violated state law, rather than a county or municipal ordinance.

ANSWER TO REQUEST FOR ADMISSION 26: Defendants admit this Request for Admission for felonies because neither cities nor counties have authority to enact ordinances creating felonies. See Idaho Code § 31-2604 (noting that cities and counties may create misdemeanors by

ordinance). Defendants object to the part of this Request for Admission that concerns misdemeanors as unduly burdensome because it would require Defendants to compile a Statewide list of all misdemeanor prosecutions and separately determine which were brought under Idaho statute and which were brought under city or county ordinance in order to determine where a majority lie.

REQUEST FOR ADMISSION 26: The State of Idaho does provide funding to county prosecutors' offices throughout the state.

ANSWER TO REQUEST FOR ADMISSION 26: Defendants deny this Request for Admission. There is no direct legislative appropriation to County Prosecutors' Offices throughout the State as such. However, some State revenues are directly distributed to counties, which in turn may use those revenues for county offices, including the County Prosecutor's Office or the County Public Defender's Office (if there is one). See, e.g., Idaho Code § 63-3636(8), -(10)(b)-(c), -(11), & -(13) (distribution of State sales tax to Counties).

DATED this 12th day of November, 2015.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
SCOTT ZANZIG
Deputy Attorney General
Attorney for Defendants State of Idaho, Hon. Molly Huskey, Darrel G. Bolz, Kimber Ricks, Sen. Chuck Winder, and Rep. Christy Perry

OFFICE OF THE GOVERNOR

By _____ for
CALLY YOUNGER per email auth.
Attorney for Governor Otter

CANTRILL SKINNER LEWIS CASEY & SORENSEN, LLP

By _____
DAVID W. CANTRILL
Attorney for Defendants William H. Wellman and Sara B. Thomas

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of November, 2015, I caused to be served a true and correct copy of the foregoing by the following method to:

| | |
|---|---|
| Richard Eppink<br>American Civil Liberties Union of Idaho Foundation<br>P.O. Box 1897<br>Boise, ID 83701 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 208-344-7201<br>☒ Email: reppink@acluidaho.org |
| Jason D. Williamson<br>American Civil Liberties Union Foundation<br>125 Broad Street<br>New York, NY 10004 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 212-549-2654<br>☒ Email: jwilliamson@aclu.org |
| Andrew C. Lillie<br>Hogan Lovells US LLP<br>One Tabor Center, Suite 1500<br>1200 Seventeenth Street<br>Denver, CO 80202 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 303-899-7333<br>☒ Email: andrew.lillie@hoganlovells.com |
| Kathryn M. Ali<br>Hogan Lovells US LLP<br>555 Thirteenth Street NW<br>Washington, DC 20004 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 202-637-5600<br>☒ Email: kathryn.ali@hoganlovells.com |
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SCOTT ZANZIG
Deputy Attorney General

# MEETING MINUTES

## STATE PUBLIC DEFENSE COMMISSION

*Date* | *time* 9/15/2015 1:00 PM | *Location* Len B. Jordan Building, Conference Room B-09, 650 W. State Street, Boise, ID 83702

*Meeting* September Commission Meeting

### Commission members present

Molly Huskey, Chair, District Judge | Kimber Ricks, Madison Co. Comm. | Chuck Winder, Senator arrived at 1:25pm | William Wellman, Defense Attorney | Christy Perry, Representative

Nichole Devaney, Admin. Asst.

### Commission members absent

Darrell Bolz, Vice Chair, Juvenile Justice Comm. | Sara Thomas, SAPD

### Others present

Kathy Griesmyer, ACLU | Eric Fredericksen, SAPD

| | Item | Responsible |
|---|---|---|
| 1. | **Welcome and Call to Order**: Judge Huskey called the meeting to order at 1:00pm. | Huskey |
| 2. | **Approval of Prior Meeting Minutes (8/19/15)**: Approval of the minutes was postponed until the next meeting to allow those members who were present an opportunity to review the minutes. | |
| 3. | **Executive Session**: Judge Huskey made a motion to move into an Executive Session as authorized by subsection 74-206F for the purpose of discussing personnel matters and an update on the pending litigation. The executive session would be attended by the commissioners only, with the exception that the administrative assistant could remain for the personnel discussion. A roll call vote was taken with all present members (4) unanimously agreeing. The public session was adjourned at approximately 1:05pm. | Huskey |
| | a. **Personnel Matters – Review of Executive Director Applicants**: Mr. Folgerson application package would need removed from consideration as it was incomplete at the time of submission. In Mr. Wellman's opinion the only viable applicants were Mr. James and Mr. Patterson. He is familiar with both candidates and offered his opinion on both. Comm. Ricks asked the members what they could learn from the previous director that would prevent similar issues. Judge Huskey offered that she would like to involve Dan Chadwick in the interview and selection process. The Commission will need someone who works well with the counties and Mr. Chadwick would be the best person to | |



**EXHIBIT 10**

provide that insight. Additionally she stated that the new director would need to be able to take direction well initially. The commission members have many years of experience with the legislature, the new director should be open to direction in that regard. Mr. Wellman shared that this person would also need the ability to delicately approach issues given the pending law suit and hurdles that face the commission at this time. Judge Huskey shared that she would like to see the commission reopen the position posting. Rep. Perry commented that she felt the position requires a great deal of administration she was not sure that an attorney after having practiced many years would be happy in an administrative role such as this. Judge Huskey and Mr. Wellman explained that some attorneys are more interested in the administrative side, these are the individuals that are comfortable working on policy, research and the like. The commission would need to find an individual such as this. Judge Huskey offered that in her opinion the current applicants have not shown interest in this type of work therefore they may not be the best fit. At this point the administrative assistant was excused and only the members remained for the litigation update.

b. **Update on Litigation from Judge Huskey:**

The public session promptly reconvened at 1:30pm at which time Rep. Perry motioned that the Executive Director position posting be reopened, Mr. Wellman seconded, and the motion passed unanimously. Reposting should be effective immediately, closing on October 5, 2015. The members would expect an update at the next meeting with the understanding that the posting had just closed. Judge Husky requested that Ms. Devaney contact the current applicants and make them aware that the position would be reposted however they need not apply again. Their application packages would be considered along with any new packages received through reposting.

4. **Discuss section VII.J.1b of the Suggested Contract Terms, finalize for submission to IAC:** Thomas

Ms. Thomas was not present therefore the discussion was postponed until the next meeting.

5. **Discuss temporary rules for Public Defender Training and Scholarship Qualification:** Thomas

The discussion was postponed until the next meeting due to Ms. Thomas absence.

6. **Joint IACDL Sun Valley Conference Update:** Ms. Devaney summarized that IACDL has agreed to partner with the Commission on the Sun Valley Conference to be held March 4 and 5, 2016. The commission will be responsible for paying IACDL $15,525 regardless of the number of attendees up to 104. Any additional attendees over 104 will be at a cost of $150.00 per registrant. The PDC would cover the cost of registration and two night's hotel for all attendees who register through the PDC. Participants traveling a distance of 200 – 300 miles would also receive a travel allocation of $150.00 Devaney

| Item | Responsible |
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those traveling a distance greater than 300 miles would receive $300. IACDL holds a dinner on Friday evening, this is typically included in the price of registration however, for PDC registrants it would be at an additional discounted cost. Rep. Perry asked if the conference is in line with training topics the commission has previously provided. Mr. Wellman assured her it was a very well done conference and would be valuable to all PD's.

7. **Addition to Agenda**: Judge Huskey asked if the Commission could discuss the Interim Committee Meeting scheduled for Friday, September 18th. She shared that she had been asked to provide an update on the Commission that should include requests for additional services/assistance the Committee could provide to help the Commission to be successful in its charge. After much discussion the following topics were suggested:

   - Statutory modification to address training funding and the ability of the Commission to conduct training programs.
   - Provide the Commission enforcement capabilities – contract terms, standards and qualification requirements will not be effective if counties are able to opt out. The addition of enforcement to the Commission's charge will require additional staff and resources.
   - Provide information on a state funding mechanisms. The following three models would be suggested: a) state administered funding from one location/agency, b) a regional funding program administered at the district level or c) leaving funding at a county level subjecting it to a cap.

   Sen. Winder moved that Judge Huskey present on the three points suggested, Mr. Wellman seconded, the motion passed unanimously.

   Judge Huskey voiced her concerns about the length of time it may take to find an Executive Director. She felt the Committee will need to be aware of the constraints the Commission maybe under due to the lack of staff as they relate to the Commissions goals for the year.

8. **Set Future Meeting Schedule**: The meeting schedule has been set through December. Jan. 5, 2016 was the only additional date added to the schedule.

9. **Agenda Items for Next Meeting**

   a. Executive Session: Personnel Issues – Applicant update

   b. High Quality Representation in Child Welfare Case (Debra Alsaker-Burke): Judge Huskey requested that Ms. Devaney contact Debra Alsaker-Burke to invite her to present at the 10/5 meeting. — Devaney

10. **Next Meeting Location**: Nampa Public Library

    The members then decided that the next meetings should be held as follows: The November meeting in Boise at the LBJ Building & December's in Nampa at the Public Library.

| | Item | Responsible |
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| 11. | **Adjournment**: Mr. Wellman motioned to adjourn, Judge Huskey seconded the motion passed unanimously. The meeting adjourned at 3:10pm. | Huskey |

Attachments:

Suggested Contract Terms
Public Defender Training and Scholarship Qualification
Memo of Understanding with IACDL

# STATE PUBLIC DEFENSE COMMISSION
## MEETING MINUTES
October 21, 2014

**Location:** State Appellate Public Defender, 3050 N. Lake Harbor Lane, Suite 100, Boise, ID 83703 **Time:** 10:00 am – 2:00 pm

**Members Present:**
Molly Huskey, Chair, District Court Judge
Darrell Bolz, Vice Chair, Juvenile Justice Commission
Jason Monks, Representative
Kimber Ricks, Madison Co. Cmmsr.
Sara Thomas, State Appellate Public Defender
William Wellman, Defense Attorney
Chuck Winder, Senator

Ian Thomson, Executive Director

**Members Absent:**
Huskey arrived at 11:00am
Winder arrived at 12:15am
Monks left at 11:30am

**Others Present:**
Marilyn Paul, Twin Falls PD
Kathy Griesmyer, ACLU-Boise
Jason Williamson, ACLU-NYC
Tanya Greene, ACLU-NYC
Rep. Luker

EXHIBIT 11

| | Minutes | Meeting Outcomes/Decisions Reached | Who's Responsible | Due Date |
|---|---|---|---|---|
| 1. | Welcome and call to order | | Bolz | |
| 2. | Call for additional items | | All members | |
| a | NORC DOJ Survey | Sara Thomas mentioned the letter she had received from NORC, addressing the national survey they are conducting for DOJ. She suggests that we send out a letter or email to the various counties (PDs or clerks) to encourage wide participation. (Marilyn Paul noted that she has received the same materials). Thomson will prepare and send the letter. | Thomson | |
| b | Meeting Minutes | Vice-Chair Bolz mentioned that no meeting minutes had been approved (past | Bolz | |

| Minutes | | Meeting Outcomes/Decisions Reached | Who's Responsible | Due Date |
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| | | four meetings.) He suggested that all members review the minutes in advance of the next meeting for the Commission's approval. | | |
| 3. | Report on PDC developments | | Thomson | |
| a | Lease, office, hiring | ED Thomson has moved forward on a lease at the Garro Building (Bannock St. downtown). The Dept. of Lands has delayed and prolonged the process considerably with their own lease. A final lease and possession is hopefully forthcoming. The problem of parking was mentioned. Thomson indicated that parking would be included in the lease and that Capital Mall parking was not available to PDC employees. Vice-Chair Bolz said he would look into parking for members of the Commission in the new garage.<br>ED Thomson indicated that interview for the administrative assistant position are scheduled for tomorrow. Interviews will be conducted with someone from HR or Rachel Murray from the SAPD in attendance. | | |
| b | ED Meetings: IACDL, IAC, ACLU, PDs in Bonner, Boundary, Kootenai, Owyhee, Gem | Thomson brought up the fact that he has met with board members of IACDL, representative of IAC and ACLU, and several county public defender office heads.<br>Ricks explained that 36 of the counties are headed by part-time commissioners, and they are in need of considerable education. Step one is educating the commissioners on the inherent conflict of relying on the prosecutors for advice regarding PD contracts. There are a few counties that are hiring outside counsel to advise on this issue. Ricks suggests a meeting with commissioners and prosecutors (or the civil deputy). All commissions meet at least once per month. Bolz suggests that the PDC consider getting on the statewide Commissioner-meeting, which is in the 1st or 2nd week of February. Ricks also suggests a regional tour. There are six commission districts, and each has a quarterly meeting. (ED will check with IAC for a schedule and consider attending those meetings.) Ricks indicated that they are frequently looking for things to put on the agenda. | Thomson | Nov. 4th |
| c | Public Defense Roster: numbers and geography | ED Thomson presented a summary of current public defender roster numbers. (Summary document was distributed to members.) Thomas inquired whether there rules that will require judges to follow certain standards when making appointments? If not, the Commission is likely to end up requiring certain standards from institutional defenders and not requiring the same from the contract attorneys in other counties.<br>Thomson passed around four geographical maps outlining the distances from out-of-town contract public defenders. It was suggested by Rep. Bolz that similar slides be prepared for the Interim Committee next week.<br>There was a discussion about how time should be considered and whether it should be included in proposed contract terms. Wellman and Thomas | | |

| Minutes | | Meeting Outcomes/Decisions Reached | Who's Responsible | Due Date |
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| | | suggested that contracts might include a "door-to-door" travel time allowance.<br>Chair Huskey mentioned the Judge's need to consider the reimbursement for attorneys' court time, and the impact it has on courthouse accommodation of the calendars for privately retained counsel and the public defender. She inquired whether public defenders get "high-centered" by spending so much time waiting for private counsel and always being heard last? | | |
| d | Travel: E.D. meetings with county defenders and commissioners | Thomas proposed a quarterly report to the Commission on the expense budget. Those in attendance were in general agreement. Thomson proposed travelling as much as possible in November and December in order to meet with county defenders and commissioners. Thomas suggested an informational presentation: it needs to be emphasized that PD reporting is necessary in order to advocate for additional resources. She advocated a presentation that convinces the county commissions and public defenders that the PDC is a resource. She reiterated that J. Burdick has already admitted that the system is broken. Thomas also proposed that someone from the PDC speak to the IACDL in Sun Valley. Wellman brought up the IACDL listserve response to Jared Hoskins' survey, which indicated that the response was very poor . He expressed a desire to receive information and input directly from defending attorneys. ED Thomson agreed to get Wellman a copy of the PD roster for contact information. | Thomson | End of week |
| 4. | Commission related mail/correspondence | Monks brought up complaints and letters being sent directly to PDC members. It was proposed that all correspondence with complaints be sent to the ED. ED Thomson is to draft and create a form letter. It will be sent around to the Commission for revisions. | Monks, Winder, other members<br>Thomson | Nov. 4th |
| 5. | Commission Media Inquiries | Chair Huskey believes that a strategy with a cohesive message from the commission needs to be composed in response to inquiries or pieces like the Moscow-Pullman Daily News, and Idaho Public Television.<br>Huskey and Thomas indicated that Spitfire Communications, out of DC, has had money in the past to help states develop media strategies regarding public defense funding and inadequacy of representation. They are a media relations firm familiar with the subject. Thomas also suggested talking to the NAPD. Huskey expressed the need for help not only in crafting that message, but in delivering it. They may help prepare a media kit. The PDC should also consider using social media (Facebook, Twitter, etc). The ED needs training on how to conduct an interview and help developing a message. Thomas suggested that Jeff Ray or Wray (at DOC), may be a resource, he was previously with Channel 2. Huskey believes that kind of training is a high priority. Wellman expressed that the Mission and Vision | Molly Huskey, other members | |

| Minutes | | Meeting Outcomes/Decisions Reached | Who's Responsible | Due Date |
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| | | Statement of the Commission gives significant guidance on the matter. Chair Huskey recommended looking at Gallatin, locally, for guidance. A motion was proposed that the PDC make an inquiry with Gallatin as to how much a press kit would cost, the motion was seconded and passed unanimously.<br>Chair Huskey asks if commission members get a media inquiry, where should they go and do they want to each individually respond? Thomas recommended that all inquiries go through the ED. Ricks says that he would like the option to respond to local media, if it is in his own community.<br>Wellman moved for a resolution that all media inquiries be forwarded to the ED, with the Commissioners' discretion to make a statement if it concerns a local political concern. The motion was seconded and passed unanimously.<br>Thomas made a motion for the ED to reach out to Spitfire and to obtain a bid from Gallatin as to how much advice on a press kit would cost. The motion was seconded and passed unanimously. | Thomson | Nov. 4th |
| 6. | Model Contracts | Chair Huskey called Dan Chadwick to inquire whether the counties wanted a template contract, or whether they wanted options to pick and choose from? Chadwick indicated that they would want various options. She suggested that the Commission first identify what is mandatory and then decide what the extra options (add-ons) would be<br>Thomas suggested that any model contract should include workload issues. Other members believed that workload issues should be on the optional menu.<br>Wellman suggested that the PDC require that commissioners not use their county attorney to advise on workloads. In his opinion, the issue of inherent conflict is a core concept. Wellman referred primarily to the Washington contract, which addressed standards, not specific caseloads.<br>In the preliminary draft, caseload and workload issues should be a mandatory element—regardless of whether this takes the form of hard caps or mere standards.<br>Members of the commission asked to see a copy of the Blaine County contract.<br>Ricks suggested a training requirement for attorneys. Chair Huskey suggested the NLADA standard for experience required to handle criminal cases. Chair Huskey suggested that maybe the PDC should keep qualification standards separate from contract requirements. Ricks responded that Commissioners probably want guidance on that issue. If the Commission establishes requirements, it will likely cost more money from the State (is this an unfunded mandate?). Such a requirement is going to impact counties fiscally.<br>Training requirements should also be kept separate and distinct from the | Huskey, Wellman, Ricks, Thomson<br>Thomson | Nov. 4th |

| Minutes | | Meeting Outcomes/Decisions Reached | Who's Responsible | Due Date |
|---|---|---|---|---|
| | | required level of experience of the attorneys.<br>Chair Huskey inquired as to whether worker's comp and malpractice would need to be a core requirement of the contract. Worker's comp is already required. Malpractice is handled differently by each attorney/county, but the insurance is quite cheap.<br>Chair Huskey expressed that any contract should include in the definitional section, the various types of cases to be covered by the services of the attorney. Thomas would like to see the model contract clearly define the types of cases that local public defenders would handle.<br>Ricks asked what is specifically missing in the Madison County contract that he sent around? He believes it works and knows that it is used as a model in other surrounding counties. Wellman explained the process of attorney selection in rural counties—that it is generally not an open bid contract.<br>Chair Huskey expressed a belief that any contract should place limits, or clearly define limits, on outside work, the expectations of the attorney, and participating in the reporting requirements. (The PDC is ultimately interested in workload information.)<br>Chair Huskey asked whether the model contract will be defining what the attorneys will be doing. Those expectations are defined by the ABA Guidelines for the criminal defense function.<br>Bolz inquired about a requirement for vertical representation and whether the contract would weigh in on the type of representation required. Chair Huskey explained her position that verticality is very difficult for some larger courthouses. | | |
| 7. | Defender Training | Thomas sent around a document with several questions.<br>Thomson suggested that the PDC could spend some of its money in partnering with the IACDL Sun Valley conference this year, which is emphasizing criminal forensics. Winder expressed an interest in the PDC sponsoring its own trainings. Members of the Commission generally agreed. Thomas raised the question about whether there were any limitations in co-sponsoring trainings with for-profit entities.<br>Thomas proposed a motion for the PDC to put on a training this year, which was seconded and adopted unanimously. | Thomas, Monks, Winder, Thomson | |
| a | IACDL seminars | | Thomson | |
| b | Determining eligibility for training | | | |
| 8. | Content of Report for Interim Committee on 10/28/14 (likely 45- | Chair Huskey suggested that the ED make the presentation to the Interim Committee next week. Sen. Winder indicated that it might be helpful for the | Huskey, Thomson | |

| | Minutes | Meeting Outcomes/Decisions Reached | Who's Responsible | Due Date |
|---|---|---|---|---|
| | minutes) | Chair to be available for questions, but thinks Ed should present the report. (Chair Huskey indicated she could make it, but not before 11:30.)<br>Ed will present the Interim Cmte. with its numbers concerning the PD Roster and the illustrations of geographic distance.<br>Ed to plan on 20-25 minute presentation, to be followed-up with their questions. Ed to provide them with additional information: Model Contract will be ready in January, and any IDAPA rules necessary by January.<br>Rep. Luker indicated that the Interim Cmte. would like a list of the legislative fixes that they could make by the November date.<br>Thomas mentioned that Judges need power to appoint; Chair Huskey mentioned that she would like to see the return of the four-year service term for public defenders. | Thomson | Oct. 28th |
| 9. | Next meeting-Assignments and Agenda (Final interim Committee 11/25/14) | Next meeting scheduled for November 4th, 2014, from 1-5pm. The meeting will be held at the Canyon County Courthouse. Chair Huskey to make arrangements and ED to notify members.<br>Any agenda items should go to the ED. | Huskey, Thomson | End of week |
| 10. | Adjournment | Thomas motioned to adjourn. Seconded, and adjourned. | Huskey | |

# Idaho Criminal Justice Commission Three-Year Strategic Plan

Approved June 29, 2012; May 24, 2013, December 13, 2013

**"Think Big, Start Small"**

Governor's Executive Order "Idaho's current criminal justice efforts and initiatives require clear strategic planning and continued coordination." The Idaho Criminal Justice Commission will continue to collaboratively develop a strategic plan to improve criminal justice policy, program and operational decision making.

| Governor's Executive Order 2011-11 | Goals | Objectives |
|---|---|---|
| "combating crime and protecting citizens from criminal depredations is of vital concern to government;..." | Reduce victimization and recidivism in the state of Idaho | Establish evidence-based and best practices relating to accountability, prevention, education and recidivism reduction<br>i) Gangs<br>ii) Sex offender management<br>iii) Children of Incarcerated Parents<br>iv) Reentry |

| Strategies | Persons Responsible | Indicators of Success | Status | Completion Date |
|---|---|---|---|---|
| 1) Report on causes of new parole violations | Brent Reinke & Olivia Craven | Annual report | | September 2014 |
| 2) Prevention Action – Reinstate Educational Climate Survey and collect gang involvement information in the survey | Elisha Figueroa and Prevention And Treatment Research (PATR) | Report<br>Youth Prevention Survey | In process<br>Working with prevention coalitions | June 2014<br>July 2014 |
| 3) Continue work with Children of Incarcerated Parents including video visitation program and pilot program for incarcerated pregnant women | Ross Mason, Chair, Children of Incarcerated Parents | Services to 70% of the children, ages 0-18, of incarcerated parents | Reports of progress | July 1, 2017 |
| 4) Sex Offender Management including developing statewide policy for juvenile and adult sex offender assessment, treatment, supervision and recidivism reduction, draft registration notification protocol | Shane Evans, Chair, Sex Offender Management Board | Adopt Administrative Rules<br>Adoption of registration notification promulgation | Legislation 2014<br>Legislation 2015 | July 2014<br>July 2015 |
| 5) Form a Reentry Council | Brent Reinke & Sharon Harrigfeld | Lower rates of recidivism | Report to ICJC | December 2014 |

EXHIBIT 12

| Governor's Executive Order 2011-11 | Goals | Objectives |
|---|---|---|
| "...providing policy makers and criminal justice decision makers with accurate information results in better decisions, improves public safety and results in the efficient use of public resources;..." | Advance delivery of justice through effective interventions by proposing balanced solutions, which are cost effective and based on best practices | 1) Determine reasonable expectation of community needs and services based on resources<br>2) Promote standards and equity throughout Idaho where applicable<br>i) Indigent defense<br>ii) Effective policing practices<br>iii) Accreditation standards<br>iv) Adjudication<br>v) Prosecution<br>3) Reduce criminogenic risk factors in both adult and juvenile populations through the expanded use of effective evidenced-based risk assessments, policies and programming to inform decision making<br>4) Ongoing assessment of problem solving courts and other community-based sentencing alternatives<br>5) Examine emerging issues |

| Strategies | Persons Responsible | Indicators of Success | Status | Completion Date |
|---|---|---|---|---|
| 1) Provide input to interim legislative committee for public defense reform | Dan Chadwick, Chair, Public Defense Subcommittee | Passage of legislation | Under consideration by interim committee | July 2015 |
| 2) Report on usage and provide education of best practices in photo line-up to decrease likelihood of false identification | Dan Hall | ICJC presentation on usage | | May 2014 |
| | | Incorporation of training at POST Council | | May 2015 |
| 3) Evaluate the pros and cons of privatization throughout criminal justice system | ICJC | Presentations of privatization effectiveness | | February 2015 |

| Governor's Executive Order 2011-11 | Goals | Objectives |
|---|---|---|
| "...it is in the best interest of the citizens of the State of Idaho that government promotes efficiency and effectiveness of the criminal justice system and, where possible, encourage dialogue among respective branches of government to achieve this effectiveness and efficiency;..." | Promote well-informed policy decisions | 1) Identify strategies to promote efficiencies and effectiveness in the criminal justice system in conjunction with the Grant Review Council<br>Award funds appropriated through federal grant programs within the purview of Planning, Grants and Research of the Idaho State Police<br>2) Continue presentations and training on trends, best practices & priority issues in adult & juvenile corrections<br>3) Create and implement data sharing mechanisms and agreements among stakeholder agencies for the purposes of cross systems analysis and reporting<br>4) Maintain awareness of substance abuse trends and priority issues |

| Strategies | Persons Responsible | Indicators of Success | Status | Completion Date |
|---|---|---|---|---|
| 1) Identify small number of longer-term focus/depth areas<br>i) Juvenile justice continuum<br>ii) Adult justice continuum | Sara Thomas, Chair, ICJC<br>Gary Raney, Vice-Chair, ICJC<br>Sheriff's Association | Theme meeting days toward focus areas or information groups held semiannually | Provide opportunity for evaluation following presentations to determine next steps | Ongoing |
| 2) Continue to promote the efforts of the "Results First" Project | Sharon Harrigfeld | ICJC report of results actionable in Idaho | | May 2014 |
| 3) Develop funding strategies consistent with statewide strategic planning efforts of the Commission including the following priorities:<br>i) Collaborative<br>ii) Evidence-based or best practice where possible enhances measurable outcomes:<br>a) The solution of crimes<br>b) Assistance to victims<br>c) Direct services to the community<br>iii) Sustainable<br>iv) Exit strategies | Gary Raney and Grant Review Council<br><br>Commission hold the Council responsible | 1) Grants awarded that address the priorities of ICJC Strategic Plan<br><br>2) Semiannual or yearly Grant Review Council updates to ICJC | 1) Grants awarded based on ICJC strategies<br><br>2) Report of awarded grants | October 2014<br><br>Semiannual |

(continued on next page)

| Strategies | Persons Responsible | Indicators of Success | Status | Completion Date |
|---|---|---|---|---|
| 4) Develop strategies among agencies and branches of government to share data | Sharon Harrigfeld, lead, and ICJC | 1) Completion of business process map | | June 2014 |
| | | 2) Using the Global Reference Architecture & the National Information Exchange Model, two or more agencies will collaborate on & implement an interface providing for the sharing of information | | September 2014 |
| 5) Develop ongoing access to behavioral health treatment from criminal justice clients. | IDOC, IDJC, IDHW, Courts | 1) Report on substance use disorder services funding, ongoing access to behavioral health treatment and trends, including Medicaid and Affordable Health Care Act | | Report every other month |
| | | 2) Presentation of models for crisis centers & determine ICJC written support | | Jan. 24, 2014 |
| 6) Identify criminal justice system budget needs and priorities | ICJC | Submit list of priorities | | July-Sept. 2014 |

# STATE PUBLIC DEFENSE COMMISSION

## Presentation to Joint Finance-Appropriations Committee for FY 2016

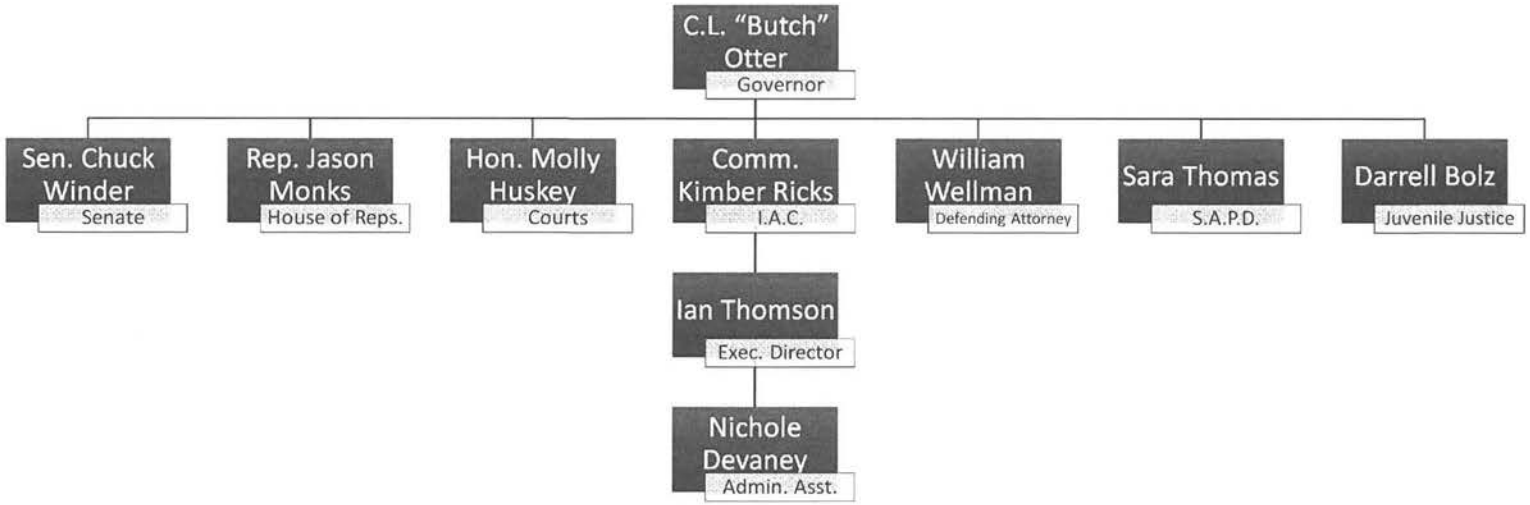
Ian H. Thomson, Executive Director

IDAHO STATE PDC PUBLIC DEFENSE COMMISSION

EXHIBIT 13

# P.D.C. Organization

Self-governing agency of the Executive



# What is the Public Defense Commission?


## The Problem

- 44 different public defender systems in Idaho
- No uniformity, no training or qualification standards
- General consensus that current system is inadequate

## The Approach

- Set reporting requirements, gather information
- Ensure public defenders have access to relevant training
- Report to legislature and make recommendations for public defense reform

# PURPOSE OF P.D.C.

- PROMULGATE RULES for public defender training and data collection regarding indigent defense services

- Maintain standards to ensure that defending attorneys have adequate TRAINING AND RESOURCES to fulfill their Sixth Amendment obligations

- Serve as a CLEARINGHOUSE OF INFORMATION for relevant stakeholders

- INFORM THE LEGISLATURE of Sixth Amendment issues and make legislative recommendations.

# START-UP COSTS

- No Capital Outlay Budget in FY 2015
- Estimated Total One-Time Outlays: $9,300
- One-Time Expense Savings
  - Acquired some furniture at no cost to state
  - Significantly reduced IT and communications through C.I.O by leasing space in the same building as other state tenants

    (Endowment Fund Investment Board and State Independent Living Council)

Because the Public Defense Commission is only **Four Months** into its **First Year** of Operations, anticipated program expenses are still **uncertain**.

In FY 2015 & FY 2016 Commission Will

(1) Seek Other Revenues, ie. Grants

(2) Identify Additional Program Expenses

# "Partial" Initial Year Means Less Spending

| | FY 2015 Approp. | FY 2015 Expected | FY 2015 Remainder |
|---|---|---|---|
| **Personnel** | $119,800 | $76,300 | $37,500 |
| Exec Dir. (<9 mos) | | $67,000 | $30,700 |
| Admin. Asst. (<8 mos) | | $9,300 | $6,800 |

Expected Personnel Reversion: **$43,500***

| | FY 2015 Approp. | FY 2015 Expected | FY 2015 Remainder |
|---|---|---|---|
| **Operating Expenses** (<9 mos.) | $70,200 | $40,800 | $29,400 |

Possible Operating Budget reversion in first year due to "partial" year.

*Full-year personnel expenses are $6,000 less than amount appropriated.

# Trustee/Benefit Payments

FY 2015 Appropriation $110,000

| Program | Spent | Planned | Beneficiaries | % of 262 PDs |
|---|---|---|---|---|
| Online Training & Resources | $3,680 | $1,000 | 186 | 71% |
| 2-Day Defender Conference | | $67,500 | 154 | 59% |
| Capital Defender Training | | $19,700 | 25 | 9% |
| Juvenile Defender Training | | $9,600 | 21 | 8% |
| **Total** | **$3,680** | **$97,800** | | |

Total Allocated Expenses for FY 2015:
**$101,480**

# Requested Change for FY 2016

No Change from FY 2015 other than 3% CEC

| Operating Budget Category | FY 2015 Appropriation | FY 2016 Request |
|---|---|---|
| Personnel Costs | $119,800 | $124,100* |
| Operating Expenditures | $70,200 | $70,200 |
| Trustee/Benefit | $110,000 | $110,000 |
| **Total** | **$300,000** | **$304,300** |
| Full-Time Positions (FTP) | 1.5 | 1.5 |

*See* FY 2016 Legislative Budget Book 5-107

*represents 3% CEC and increased cost of benefits

*The Office of the Governor*

*Executive Department*
*State of Idaho*

*EXECUTIVE DEPARTMENT*
*STATE OF IDAHO*
*BOISE*

*State Capitol*
*Boise*

***EXECUTIVE ORDER NO. 2015-04***

***ADOPTING IDAHO'S SAGE-GROUSE MANAGEMENT PLAN***

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*WHEREAS, in December 2011, the U.S. Department of the Interior invited the eleven (11) western states impacted by a potential Endangered Species Act (ESA) listing of the greater sage-grouse to develop state-specific conservation plans that would conserve the species and its habitat while maintaining predictable levels of land use; and*

*WHEREAS, Governor Otter accepted the federal government's invitation, and by and through Executive Order 2012-02 established the Governor's Sage-grouse Task Force (Task Force) to collaboratively develop science-based recommendations for inclusion in Idaho's sage-grouse conservation plans; and*

*WHEREAS, in September 2012, and based on recommendations from the Task Force, I submitted the Federal Alternative of Governor C.L. "Butch" Otter for Greater Sage-grouse Management in Idaho (Governor's Alternative) as an alternative for inclusion in the National Greater Sage-grouse Land Use Planning Strategy. This national planning strategy amends some 68 U.S. Bureau of Land Management (BLM) planning units and 20 U.S. Forest Service (USFS) National Forest Plans by including objectives, habitat conditions and management actions for sage-grouse; and*

*WHEREAS, in February 2013, the U.S. Fish and Wildlife Service (FWS) published the Greater Sage-Grouse Conservation Objectives Team Final Report (COT Report). The purpose of the COT Report, which was developed in conjunction with state wildlife agencies, was to establish the ESA goals by identifying Primary Areas of Conservation (PAC) and the threats to the species throughout its range, as well as to develop conservation measures, based on the best available science, to address those threats. The COT Report provides the flexibility to create solutions that meet the needs of greater sage-grouse and the local ecological and socioeconomic conditions; and*

*WHEREAS, Governor Otter requested the FWS to evaluate the Governor's Alternative for consistency under the COT Report, and in April 2013, the FWS concluded that the foundational elements, and some individual components, within the Governor's Alternative were consistent with the COT Report. (App. 2); and*

*WHEREAS, based on the strength of FWS's recommendation, the BLM and USFS selected the Governor's Alternative as a co-preferred alternative within Idaho's portion of the national planning strategy (see Alternative E in the Idaho and Southwestern Montana Greater Sage-Grouse Draft Land Use Plan Amendments and Draft Environmental Impact Statement, 78 Fed. Reg. 65,703 (Nov. 1, 2013)); and*

*WHEREAS, the State has continued refining individual components of the Governor's Alternative, including but not limited to: (1) Idaho Code § 38-104B developing rangeland fire protection associations; (2) the State Board of Land Commissioners on April 21, 2015, adopting the Land Board's Greater Sage-grouse Conservation Plan (Land Board Plan) for State endowment lands complementary to the Governor's Alternative (App. 3); (3) the State Oil and Gas Conservation Commission on April 23, 2015, adopting portions of the Land Board Plan applicable to oil and gas programs (App. 3, p. 38); (4) working collaboratively with the local federal agencies' representatives and Task Force members to better clarify the Governor's Alternative; and (5) increasing state funding for enhanced lek monitoring, habitat restoration projects, and wildfire suppression; and*

*WHEREAS, it is vital to the interests of the State to continue these efforts as the listing of the species and/or overly restrictive federal land-use plan amendments would adversely impact Idaho's sovereign interest in managing its wildlife pursuant to Idaho Code § 36-103 and § 67-818, its customs, culture and way of life, and the State's ability to generate revenues from private property and endowment lands;*

*NOW, THEREFORE, I, C.L. "BUTCH" OTTER, Governor of the State of Idaho, by the authority vested in me under the Constitution and laws of the State of Idaho do hereby order the following:*



**EXHIBIT 14**

*That all executive agencies, to the extent consistent with existing state law, for relevant permits and policies, adopt the Governor's Alternative and all supporting documentation, incorporated in its entirety into this Executive Order by this reference, hereinafter known as "Idaho's Sage-grouse Management Plan," which includes:*

***I. Application of the foundational elements of Idaho's Sage-grouse Management Plan (Idaho's Plan) to all landownerships.*** *These foundational elements are consistent with the COT Report and apply across all land ownerships.*

a. ***Habitat Zones*** *– Idaho's Plan includes three distinct management zones: Core Habitat Zone (CHZ), Important Habitat Zone (IHZ), and General Habitat Zone (GHZ). The COT Report identified the most important habitat areas for maintaining sage-grouse representation, redundancy, and resiliency across the landscape. These areas (or PACs) closely align with CHZ and IHZ. The three management zones within the Sage-grouse Management Area (SGMA) represent a management continuum that includes, at one end, a relatively restrictive approach aimed at providing a high level of protection to the species within the CHZ, and on the other end, a relatively flexible approach for the GHZ allowing for more multiple-use activities. The zones are reflected in the attached map. (App. I, p. 24).*

   i. *Core Habitat Zone (CHZ) – The CHZ includes approximately sixty-five percent (65%) of the known active leks and is occupied by approximately seventy-three percent (73%) of sage-grouse males. CHZ supports the highest breeding densities of sage-grouse in Idaho, and maintenance of these populations ensures that Idaho has a viable and robust population of sage-grouse. Management in CHZ is the most restrictive to protect what local data shows as the "best of the best" habitat.*

   ii. *Important Habitat Zone (IHZ) – The IHZ includes approximately twenty-five percent (25%) of the known active leks and is occupied by approximately twenty-two percent (22%) of sage-grouse males.*

   iii. *General Habitat Zone (GHZ) –This management zone includes five percent (5%) of sage-grouse males, and generally includes few active leks and fragmented or marginal habitat.*

b. ***Population Objectives*** *– In conjunction with the habitat zones, these population goals: (1) measure the efficacy of the State plan; and (2) ensure that there is an appropriately tailored response to significant fluctuations in habitat and populations.*

   i. ***Objective 1*** *– Implement regulatory mechanisms that maintain and enhance sage-grouse habitats, populations, and connectivity within CHZ. Recognizing the impact of wildfire, the IHZ provides important management flexibility and a strategic conservation buffer.*

   ii. ***Objective 2*** *– Stabilize sage-grouse habitats and populations by monitoring the effectiveness of the regulatory measures over time. A primary objective is to minimize habitat lost within CHZ, and to a lesser extent, IHZ.*

c. ***Conservation Areas*** *– Idaho's Plan divided the SGMA into four Conservation Areas (CA) across the state: the Mountain Valleys, Desert, West Owyhee, and Southern. Each CA is divided into Core, Important, and General management zones. (App. 1, p. 8).*

d. ***Adaptive Regulatory Triggers*** *– Given the unpredictability of wildfire, these triggers provide a regulatory backstop to manage loss within a CA. An adaptive trigger is employed when dramatic shifts in the population or habitat occurs based on an average over a three year period compared to the 2011 baseline.*

   i. *The adaptive triggers are based on the severity of habitat or population loss (i.e. a "soft trigger" or a "hard trigger"). (App. 1, pp. 11, 69-71).*

   ii. *When monitoring information indicates that a soft trigger may be tripped, the Implementation Commission[1] – aided by technical expertise from Idaho Department of Fish and Game and other relevant State agencies – will assess the*

[1] Should the BLM and USFS adopt the Governor's Alternative, or an alternative consistent with the Governor's Alternative, for incorporation into relevant Land and Resource Management Plans, the Governor shall execute a companion Executive Order establishing an Implementation Task Force as outlined in Appendix 1, pages 21, 67–71.

*factor(s) leading to the decline and recommend potential management actions. (App. 1, p. 69).*

iii. *If the hard trigger becomes operative, management changes no longer are discretionary and will be implemented by the Implementation Task Force.*

e. ***Rangeland Fire Protection Associations (RFPA)*** *– RFPAs act as a regulatory mechanism across all landownerships ensuring quicker initial attack on wildfires in the CHZ and IHZ through the deployment of additional trained firefighters and resources located in rural parts of the SGMA.*

i. *Idaho Code § 38-104B provides for the creation and funding of RFPAs in Idaho.*

ii. *RFPA members work collaboratively with federal land management agencies and Idaho Department of Lands (IDL) to protect more than 2.9 million acres of federal and state rangeland and 675,000 acres of private land. These numbers are expected to grow as additional RFPAs become operational in the near future.*

iii. *The success and effectiveness of RFPAs in Idaho is considered a model by other western states.*

***II.*** ***Applicability of Idaho's Plan to Lands Managed by the Federal Government*** *(as more fully described in Alternative E of the Draft Environmental Impact Statement)*[2]

a. ***Fire*** *– Idaho's Plan for wildfire on federal lands focuses efforts on prevention, suppression, and restoration. The objective within Idaho's Plan is to implement actions necessary to manage fire within the normal range of fire activity and maintain and restore healthy, native sage-steppe plant communities within CHZ and IHZ.*

b. ***Invasive species*** *– In addition to the wildfire restoration efforts, Idaho's Plan calls for the aggressive management of exotic undesirable plant species within the CHZ and IHZ.*

c. ***Infrastructure*** *– Infrastructure means discrete, large-scale anthropogenic features, including but not limited to, highways, high voltage transmission lines, commercial wind projects, energy development (e.g. oil and gas development, geothermal wells), airports, mines, cell phone towers, landfills, residential and commercial subdivisions. (App. 1, p. 32).*

i. *Permitted activities in specific habitat designations*

1. *Infrastructure in CHZ – Infrastructure development in areas designated as CHZ is prohibited, except if conducted pursuant to a valid existing right, incremental upgrade and/or capacity increase of existing development, or if a project-level exemption is obtainable by meeting the criteria outlined in Appendix 1, including compensatory mitigation. (App. 1, pp. 35-36).*

2. *Infrastructure in IHZ – Infrastructure development in areas designated as IHZ is permissible subject to meeting the criteria specified within Idaho's Plan and approved by the BLM State Director. (App. 1, p. 42)*

ii. *Best Management Practices (BMPs) for proposed infrastructure development within CHZ and IHZ.*

1. *Infrastructure development should reflect unique localized conditions including soils, vegetation, development type, predation, climate, and other local realities and should utilize best management practices as described in Idaho's Plan. (App. 1, pp. 43-45).*

2. *A lek buffer of 1 km (0.6 miles) from occupied leks will be applied to essential public services, including but not limited to distribution lines, domestic water lines, and gas lines. This will enable development in a manner that maintains populations, habitats, and essential migration routes where possible. (App. 1, pp. 43-45).*

3. *No Surface Occupancy (NSO) within 1 km of an occupied lek will be applied to oil and gas development. (App. 1, pp. 46-47)*

[2] Governor Otter encourages the adoption of Alternative E in the final EIS as it is consistent with the laws, programs, and policies of the State of Idaho. However, the Governor recognizes that the BLM and USFS may adopt a different alternative (or revised alternative) in the record of decision (ROD) and such action may necessitate a revision to this Executive Order.

iii. *Nothing in Idaho's Plan shall revoke, suspend, or modify any project or activity decision made prior to the effective date of the ROD.*

d. ***Improper livestock grazing (secondary threat)*** *–This section of Idaho's Plan requires that the Idaho Rangeland Health Standards (IRHS) be met and is consistent with the COT report. While no studies exist directly relating livestock grazing systems or stocking rates to sage-grouse abundance or productivity, Idaho's Plan addresses improper livestock grazing within CHZ and IHZ through adaptive management according to the following process:*

i. *Sage-grouse habitat characteristics will be incorporated into relevant Resource Management Plans as desired conditions, recognizing that these desired conditions may not be achievable due to the existing ecological condition of an allotment, the ecological potential of the area, or causal events unrelated to livestock grazing. (App. 1, pp. 14-20).*

ii. *Based on these habitat characteristics, habitat assessments will be conducted to help inform grazing management in conjunction with scheduled term grazing permit renewals or if an adaptive regulatory trigger has been tripped. (App. 1, p. 73-75).*

iii. *In conjunction with scheduled term grazing permit renewals, livestock grazing will be assessed through the IRHS (primarily Standards 2, 4, and 8), as informed by the COT Report with respect to sage-grouse. (see Idaho Standards for Rangeland Health and Guidelines for Livestock Grazing Management (1997)).*

1. *Assuming no adaptive regulatory trigger has been tripped, there is a rebuttable presumption that current grazing systems within a particular CA are adequate to maintain viable sage-grouse populations.*
2. *This does not preclude adaptive changes to grazing permits based on the other standards contained in the IRHS.*

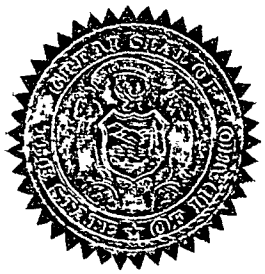
iv. *If an adaptive regulatory trigger has been tripped within a CA, and after a more thorough analysis of those allotments within a relevant CA determines that improper livestock grazing is a potential limiting factor, modifications to permits will be determined based on ecological site potential and will be selected from the suite of management options outlined in Idaho's Plan. (App. 1, pp. 48-50).*

***III. Applicability of Idaho's Plan on State and private lands***

a. *In April 2015, the State Board of Land Commissioners and the Idaho Oil and Gas Conservation Commission contingently approved the Land Board Plan. (App. 3). The Land Board Plan, consistent with the constitutional mandate (IDAHO CONST. ART. IX, § 8), includes enforceable regulatory stipulations for inclusion into certain leases, permits, and easements on State endowment lands. Adoption and implementation of the Land Board Plan is contingent upon the incorporation of Idaho's Plan into the federal land-use plan amendments for sage-grouse.*

b. *Certain permit holders on private lands can voluntarily agree to add BMPs into their permit, which would then become binding. However, private land comprises less than twenty percent (20%) of sage-grouse habitat in Idaho (and less than 6% of the CHZ).*

c. *Existing land uses and landowner activities are vital to the State of Idaho. Idaho's Plan recognizes changes in sage-grouse populations and habitats on private lands could influence land management on public lands as adaptive triggers can become operative within a CA regardless of landownership. To offset any impacts, SGMAs have been designed to provide flexibility in order to allow for the continuation of land uses and valid existing rights. In addition, Idaho continues to encourage voluntary conservation efforts on private land for the conservation of sage-grouse.*



*IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Idaho at the Capitol in Boise on this 27th day of May, in the year of our Lord two thousand and fifteen, and of the independence of the United States of America the two hundred thirty-ninth and of the Statehood of Idaho the one hundred twenty-fifth.*

*C.L. "BUTCH" OTTER*
*GOVERNOR*

*LAWERENCE DENNEY*
*SECRETARY OF STATE*

*The Office of the Governor*

*Executive Department*
*State of Idaho*

*EXECUTIVE DEPARTMENT*
*STATE OF IDAHO*
*BOISE*

*State Capitol*
*Boise*

## *EXECUTIVE ORDER NO. 2015-03*

## *AUTHORIZING THE DEPARTMENT OF HEALTH AND WELFARE TO IMPLEMENT A FDA-APPROVED EXPANDED ACCESS PROGRAM FOR TREATMENT-RESISTANT EPILEPSY IN CHILDREN*

---

*WHEREAS, Idaho's citizens with severe or life-threatening diseases or conditions may not be able to access critical medications that are still in clinical trials; and*

*WHEREAS, the U.S. Food and Drug Administration (FDA) has established Expanded Access Programs to allow limited, supervised access to such medications; and*

*WHEREAS, the FDA has approved an Expanded Access Program for Epidiolex®, a drug being evaluated for treatment-resistant epilepsy; and*

*WHEREAS, it is estimated that eight people per 1,000 have active epilepsy; and*

*WHEREAS, there are children in Idaho with treatment-resistant epilepsy who may benefit from Epidiolex®; and*

*WHEREAS, the Department of Health and Welfare operates to improve the health status of Idahoans, increase the safety and self-sufficiency of individuals and families, and enhance the delivery of health and human services;*

*NOW, THEREFORE, I, C.L. "BUTCH" OTTER, Governor of the State of Idaho, by virtue of the authority vested in me by the Constitution and laws of the State of Idaho, do hereby order as follows:*

1. *The Department of Health and Welfare shall investigate the need for, and implement if appropriate, as determined by the Department, a FDA-approved Expanded Access Program for Epidiolex®;*
2. *Further, as part of the investigation, the Department shall estimate the scope of the need in Idaho for this program, and shall determine whether appropriate medical supervision is available that allows safe and effective implementation of such a program;*
3. *If implemented, the Department shall investigate and monitor long-term solutions, such as licensure of the medication, that may reduce or eliminate the need for the program in the future; and*
4. *The Department shall track funding utilized for the program and may accept private contributions, federal funds, funds from other public agencies or any other source for the purpose of implementing this study.*

*IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Idaho at the Capitol in Boise on this 16th day of April, in the year of our Lord two thousand and fifteen, and of the independence of the United States of America the two hundred thirty-ninth and of the Statehood of Idaho the one hundred twenty-fifth.*

*C.L. "BUTCH" OTTER*
*GOVERNOR*

*LAWERENCE DENNEY*
*SECRETARY OF STATE*

C.L. "BUTCH" OTTER
GOVERNOR

*EXECUTIVE DEPARTMENT*
*STATE OF IDAHO*
*BOISE*

# *EXECUTIVE ORDER NO. 2010-11*

## *REVIEWING THE PREPARATION AND ADMINISTRATION OF IDAHO'S PLAN UNDER THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT*

*WHEREAS, the State of Idaho, in accordance with the provisions of the Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C. § 5601 ("JJDPA"), is required to designate a state agency to supervise and administer Idaho's plan under the JJDPA and to establish a state juvenile justice advisory group; and*

*WHEREAS, the first regular session of the 53rd Idaho Legislature established the Idaho Department of Juvenile Corrections ("Department") and amended existing law to create a juvenile corrections system based on principles of accountability, community protection, and competency development; and*

*WHEREAS, the purposes and intent of Idaho's Juvenile Corrections Act of 1995 and the JJDPA was better served by transferring the Idaho Juvenile Justice Commission ("Commission") to the Department; and*

*WHEREAS, the Department was designated as the sole agency for supervising the preparation and administration of Idaho's plan under the JJDPA, and the Office for Juvenile Justice and Delinquency Prevention was abolished effective July 1, 1995; and*

*WHEREAS, the Commission was transferred from the Office of the Governor to the Department effective July 1, 1995, and has functioned as the advisory group referenced in Title 42, Section 5633(a)(3), United States Code; and*

*NOW, THEREFORE, I, C.L. "Butch" Otter, Governor of the State of Idaho, by the authority vested in me by Article IV, Section 5, of the Idaho Constitution, and Section 67-802, Idaho Code, do hereby order that:*

1. *The composition of membership of the Commission shall be in conformity with the JJDPA. The chairman, vice-chairman, and members of the Commission shall be appointed by, and serve at the pleasure of the Governor. Members shall serve a term of three years, except for the youth members who shall serve a term of one year. The chairman and vice-chairman shall serve in such capacities for three years.*

2. *The Commission shall perform the following functions:*

   a. *Advise the Department on juvenile justice and delinquency prevention issues;*

   b. *Participate in the development and review of Idaho's plan under the JJDPA;*

   c. *Be afforded an opportunity to review and comment on all grant applications under the JJDPA submitted by the Department;*

   d. *Ensure compliance with the core protections of the JJDPA by jurisdictions with public authority in Idaho through education, technical assistance, monitoring and remedial actions for violations;*

   e. *Perform such other duties that the JJDPA requires to be performed by the advisory group referenced in Title 42, Section 5633(a)(3), United States Code;*

   f. *Perform such other duties that the JJDPA requires to be performed by the supervisory board referenced in Title 42, Section 5671(c)(1), United States Code,*

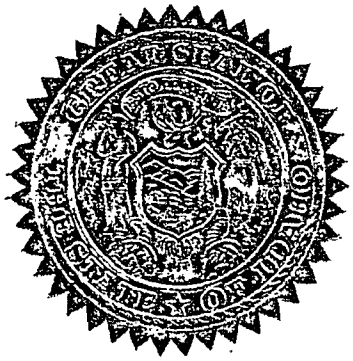


**EXHIBIT 16**

*and Title 28, Section 31.102(b), Code of Federal Regulations, until such time as the director of the Department may establish another committee, commission, or board within the Department to perform those duties; and*

g. *Perform such other duties as requested by the director of the Department, which may include submitting reports to the director of the Department and making decisions on grant applications under the JJDPA submitted to the Department.*

*This Executive Order shall cease to be effective four years after its entry into force.*



*IN WITNESS WHEREOF, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Idaho at th e Capitol in Boise on this 4th day of October in the year of ou r Lord two th ousand and ten and of the Indepe ndence of t he United States of America the two hundred thirty-fifth and of the Statehood of Idaho the one hundred twenty-first.*

*C.L. "BUTCH" OTTER*
*GOVERNOR*

*BEN YSURSA*
*SECRETARY OF STATE*

Hoagland-Stephanie
11/25/15
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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FILED JULY 8, 2015**

**(CORRECTED)**



A

This lawsuit is not, as Defendants suggest, about miscreant counties refusing to obey Idaho's public defense statutes. Rather, Plaintiffs complain that public defense services across the state have failed under the weight of contemporary caseloads, an absence of coherent practice standards, and a far-reaching, longstanding lack of resources. The Chief Justice of Idaho's Supreme Court has already stated that the statewide system is "broken." 2d Aff. Eppink ex. 1. Defendant Governor Otter, too, has declared that the system "does not pass constitutional muster." *Id.* ex. 2 at 8. Plaintiffs, and poor Idahoans accused of crimes across the state, call upon this Court, in fulfillment of its fundamental role to interpret and vindicate core constitutional rights, to render judgment on the statewide system.

In considering this motion to dismiss under I.R.C.P. 12(b), the Court must draw all inferences from the record and pleadings in the Plaintiffs' favor. *ISEEO v. Evans*, 123 Idaho 573, 578 (1993). The Court must liberally construe the complaint and presume that all facts alleged there are true. *Argonaut Ins. Co. v. White*, 86 Idaho 374, 376 (1963).

## I. The Defendants Bear Ultimate Responsibility For Ensuring That Constitutional Rights of Idahoans Are Protected.

In support of the motion to dismiss, Defendants suggest that Plaintiffs have not only sued the wrong parties, but that, under Idaho law, it is Idaho's 44 separate counties—not state officials—that collectively bear responsibility for a deficient statewide system. These arguments fail for three reasons.[1] First, decades of U.S. Supreme Court case law make it clear that states have the ultimate responsibility for ensuring that adequate indigent defense services are available. Second, although Defendants may delegate some of their constitutional duties to

[1] Defendants also contend that Plaintiffs prayed for relief only from the State of Idaho itself. But, in paragraph 3 of the Complaint, Plaintiffs defined "State" to refer to all of Defendants throughout the Complaint. (Similarly, this Response uses "the State" to refer to Defendants.) Accordingly, the prayer seeks relief from all Defendants.

counties, they cannot simply wash their hands of the state's duties and avoid responsibility if those duties go unfulfilled. This is especially true where, as in this case, the majority of the counties are unable to fulfill their duties because they do not have the resources, training, or supervision to do so. *See* Compl. ¶¶ 9–20, 36. Third, unlike some rights protected by the state and federal constitutions, the right to counsel for indigent defendants places on the State an affirmative duty to guarantee that this right is respected.[2]

**A. The U.S. Supreme Court Has Indicated Repeatedly That Indigent Defense Is the State's Responsibility.**

The U.S. Supreme Court determined long ago that the Due Process Clause of the Fourteenth Amendment incorporates most sections of the Bill of Rights (including the Sixth Amendment), thereby making them applicable to the states. Specifically, the Supreme Court has made clear that the right to counsel applies to the states. *See, e.g., Powell v. State of Alabama*, 287 U.S. 45, 67–68 (1932) (Fourteenth Amendment due process clause incorporates the Sixth Amendment right to counsel in capital cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the right to counsel in felony cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (incorporating the right to counsel in misdemeanor cases). The Idaho Supreme Court has, in turn, acknowledged that the Sixth Amendment right to counsel applies to the State of Idaho. *See Abercrombie v. State*, 91 Idaho 586, 592 (1967).

As such, it is no surprise that the U.S. Supreme Court has repeatedly referenced the ***State's*** responsibility to ensure that its citizens' Sixth Amendment rights are protected. First, in

[2] Though Defendants are correct that the State of Idaho itself is not a "person" for the purposes of prospective injunctive relief under 42 U.S.C. § 1983, the State itself remains a proper defendant to the Plaintiffs' state law claims and requests for declaratory judgment. *See ISEEO v. State of Idaho*, 142 Idaho 450, 453 (2005) [hereinafter *ISEEO V*] (affirming judgment against State of Idaho in systemic reform litigation). The individual defendants, sued in their official capacities, are proper defendants as to all of the Plaintiffs' claims.

explicitly overruling its previous decision in *Betts v. Brady* 316 U.S. 455 (1942), the Court in *Gideon* noted that "the *Betts* Court, when faced with the contention that 'one charged with crime, who is unable to obtain counsel, must be furnished counsel *by the state*,' conceded that '(e)xpressions in the opinions of this court lend color to the argument.'" *Gideon*, 372 U.S. at 343. Since then, the long line of cases following *Gideon* has consistently reiterated the point.

For instance, in *Cuyler v. Sullivan*, the Court clarified that under *Gideon*, it is the State's responsibility to guarantee that defendants receive constitutional representation in criminal actions brought by the State: "When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. . . . Thus, the Sixth Amendment does more than require the States to appoint counsel for indigent defendants." 446 U.S. 335, 343-44 (1980) (internal citations omitted). Numerous other cases have also recognized the State's ultimate responsibility for ensuring a fair trial for indigent defendants prosecuted by the State. *See, e.g.*, *Bounds v. Smith*, 430 U.S. 817, 825 (1977) ("State expenditures are necessary to pay lawyers for indigent defendants at trial," citing *Gideon* and *Argersinger*); *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996) ("A State must provide trial counsel for an indigent defendant charged with a felony" (citation omitted)); *Tennessee v. Lane*, 541 U.S. 509, 532-33 (2004) (recognizing a number of affirmative obligations that flow from the well-established principle that a State must provide all individuals with a meaningful opportunity to be heard in its courts, including "the duty to provide counsel to certain criminal defendants"); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 332 (1985) ("[W]e have held that this provision requires a State prosecuting an indigent to afford him legal representation for his defense"); *Ludwig v. Commonwealth of Massachusetts*, 427 U.S. 618, 627 (1976) ("[I]f an accused is indigent, the State is required to furnish him counsel without cost before he may be deprived of

his liberty." (citation omitted)). There is no question that it is each state's responsibility to ensure that indigent defendants' Sixth Amendment rights are realized.

**B. The State Has an Affirmative Duty to Ensure Sixth Amendment Compliance.**

States do not just bear ultimate responsibility for indigent defense—they have an ***affirmative duty*** to guarantee that indigent defense is constitutionally adequate. The Supreme Court has emphasized this again and again. In *Bounds*, it held that "an indigent defendant's right under the Sixth Amendment places upon the State the affirmative duty to provide him with counsel for trials which may result in deprivation of his liberty." 430 U.S. at 834. Eight years later, in *Maine v. Moulton*, the Court made this even clearer, holding that the Sixth Amendment "imposes on the State an affirmative obligation" and further specifying that "this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." 474 U.S. 159, 171, 176 (1985). The Sixth Amendment right to counsel, therefore, is unlike many of the rights preserved in the Bill of Rights, such as the First Amendment freedom of speech or the Fourth Amendment right to privacy, which simply prohibit certain state actions. Rather, the Sixth Amendment is one of a few special constitutional guarantees that require states to take affirmative steps to supply necessary resources and supervision to see that the Constitution is carried out. *Cf. Estelle v. Gamble*, 429 U.S. 97, 103-104 (1976) (holding that states must provide adequate medical care to prisoners in their custody, under the Eighth Amendment); *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982) (holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their reasonable safety from themselves and others.); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (holding that the Due Process

Clause requires states to provide medical care to suspects in police custody who have been injured while being apprehended).

Together, the Supreme Court later explained, these "affirmative duty" guarantees require that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 199-200 (1989) (citation omitted). The Court went on to explain the reason for this:

> The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

*Id.* at 200 (citations omitted). The same principle applies in the context of indigent defense, where the State has a similar duty to ensure that defendants prosecuted by the State receive a fair trial in accordance with the Sixth Amendment. As the Court explained in *Moulton*, when the State hales a person into court and threatens her liberty, it is the State that has the corresponding "affirmative obligation" to provide competent counsel if she cannot afford an attorney. *Moulton*, 474 U.S. at 171.

The parallel state constitutional guarantee, in Article 1, Section 13, of the Idaho Constitution, is at least coextensive with the Sixth Amendment right. *See State v. Tucker*, 97 Idaho 4, 7 (1975); *cf. State v. Cada*, 129 Idaho 224, 230 (1996); *State v. Curtis*, 106 Idaho 483, 488 n.4 (1984); *Rudd v. Rudd*, 105 Idaho 112, 115 (1983); *see also Bement v. State*, 91 Idaho 388, 395 (1966) (noting the extreme importance of the right to counsel in Idaho, calling it "the most pervasive right of an accused" (citation omitted)). Because that guarantee is part of the state constitution, it is, obviously, the State that is responsible for fulfilling it. And if no State of

Idaho official is tasked with fulfilling a constitutional responsibility, as the State seems to suggest, it is the judiciary's job to declare a constitutional violation. *See* I.C. § 10-1201.

**C. Delegation Is Not Abdication.**

Noting that "Counties or other local units of government have provided whatever indigent defense services were provided at the trial level," Defendants argue that the Idaho Constitution "contemplated that Counties would provide many governmental services required by law." Although such delegation is permitted, the counties are merely subdivisions of the state that are tasked with carrying out state responsibilities. As such, the counties' failure is the State's failure. *See Strickfaden v. Green Creek Highway Dist.*, 42 Idaho 738, 738 (1926) ("Counties are generally . . . involuntary subdivisions or arms of the state through which the state operates for convenience."); *see also Ada Cnty. v. Wright*, 60 Idaho 394, 404 (1939) ("Moreover the building and maintenance of the roads and highways by the state is one of the sovereign duties of government; and the act here involved, recognizing this duty on the part of the state, constitutes counties and highway districts *as agencies and arms of the state for carrying out its governmental purpose*." (emphasis added) (citations omitted)). Hence, the counties' failure to fulfill State responsibilities—not out of intransigence or negligence, but due to lack of resources and supervision—ultimately lies at the feet of the State. Indeed, the Governor's own Criminal Justice Commission ("CJC") acknowledged this in its report on Idaho's public defense system: "As with other rights that are fundamental and essential to a fair trial, the vindication of the Sixth Amendment right to counsel is a state responsibility. Although a state may delegate its duty to apprise citizens of this right to counties, it is ultimately the state's responsibility to ensure that the constitutional obligation is met." 2d. Aff. Eppink ex. 3 at D'1153.

Idaho courts have interpreted the relevant sections of the Idaho Constitution as conveying no authority to the counties independent from the state. *See, e.g., Shillingford v. Benewah Cnty.*, 48 Idaho 447, 453 (1929) ("County commissioners must act as a board, and have only such power as is expressly or impliedly conferred on them by statute." (internal citations omitted)). Article XVIII, Section 5, of the Idaho Constitution states that "[t]he legislature shall establish, subject to the provisions of this article, a system of county governments which shall be uniform throughout the state; and by general laws shall provide for township or precinct organizations." *Id.* § 5. Section 11 provides that "[c]ounty, township, and precinct officers shall perform such duties as shall be prescribed by law." *Id.* § 11. Courts have clarified that under these provisions, counties have no authority or responsibility independent from the state. *See, e.g., Shillingford*, 48 Idaho at 453; *Prothero v. Bd. of Comm'rs of Twin Falls Cnty.*, 22 Idaho 598 (1912).

A number of federal appeals courts, in the context of both constitutional and statutory obligations, also have found that states may not escape liability by merely delegating their obligations to the counties. For instance, in *Stanley v. Darlington County School District*, a case involving a State's obligation to desegregate its public schools, the Fourth Circuit clearly stated that a State's right to delegate power to a political subdivision does not absolve the State of its ultimate responsibility:

> Because the Fourteenth Amendment imposes direct responsibility on a state to ensure equal protection of the laws "to any person within its jurisdiction," a state's delegation to a political subdivision of the power necessary to remedy the constitutional violation does not absolve the state of its responsibility to ensure that the violation is remedied. Even if a state gives its local school districts the power and means to remedy segregation, it can still be sued by the students in those districts for its failure to take steps to dismantle a dual educational system that it created.

84 F.3d 707, 713 (4th Cir. 1996) (citations omitted). Others have recognized the same principle. *See, e.g., Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) ("Although the state is

permitted to delegate administrative responsibility for the issuance of food stamps, 'ultimate responsibility' for compliance with federal requirements nevertheless remains at the state level." (citation omitted)); *Woods v. United States*, 724 F.2d 1444, 1447 (9th Cir. 1984) ("While the state may choose to delegate some administrative responsibilities . . . the ultimate responsibility for operation of the plan remain[s] with the state." (citations omitted)); *Kruelle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687, 697 (3d Cir. 1981) (holding that state department of education is liable for failure of local school district to comply with federal law.)

Under the cases cited above, the responsibility under the Sixth Amendment lies with the State, which cannot abdicate its constitutional duty by simply delegating administrative responsibility for public defense to the counties.

## II. As the Only State Officials Who Give Effect to Idaho's Statewide Indigent Defense System, the Governor and PDC Members Are Proper Defendants In Litigation Challenging the Adequacy of That System.

In its seminal 1908 decision in *Ex parte Young*, the Supreme Court held that state officials sued in their official capacities for prospective or declaratory relief are proper defendants so long as the officials have "some connection" to the laws involved. 209 U.S. 123, 157 (1908). The Governor and the members of the Public Defense Commission ("PDC") rest their argument that no relief can be granted here on cases, like *Association des Éleveurs de Canards et d'Oies du Québec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013), involving state laws authorizing enforcement proceedings or other state action directly against individuals. However, Defendants' "affirmative obligation" to maintain an adequate statewide public defense system, *Moulton*, 474 U.S. at 171, is "simply not the type of statute that gives rise to enforcement proceedings." *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). Accordingly, when a state law "is not of the type to give rise to enforcement proceedings, a state

official nonetheless may be named as a defendant under *Ex parte Young* if he has [a] responsibility to 'give effect' to the law." *Idaho Bldg. & Constr. Trades Council v. Wasden*, 32 F. Supp. 3d 1143, 1148 (D. Idaho 2014) (citation omitted).

The decision in *Los Angeles County Bar Association v. Eu* shows how the *Ex parte Young* analysis works when plaintiffs challenge systemic issues, as they do here, rather than the failure to enforce a criminal or regulatory statute. In *Eu*, the plaintiffs challenged the California legislature's limit on the number of judges for Los Angeles County. 979 F.2d at 700. The County itself, despite having the option under state law to allow appointment of additional judges above the limit, was not a defendant in the appeal. *Id.* at 700 n.1. The defendant governor and secretary of state, like their counterpart defendants in this case, argued that it was the legislature—not executive branch officials—that had the power to determine the appropriate number of judges to be assigned to each county and claimed Eleventh Amendment immunity from suit based on their lack of connection to the establishment of the limit on judges. *Id.* at 701, 704. The Ninth Circuit rejected those arguments. *Id.* at 704. Noting that the case was not of the kind involving "enforcement proceedings," it held that the Governor's power to appoint judges and the secretary of state's duty to certify judicial elections was a sufficient connection to the challenged system—despite that neither official had the power to directly increase the number of judges. *Id.* Moreover, the court added that "[w]ere this court to issue the requested declaration, we must assume that it is substantially likely that the California legislature, although its members are not all parties to this action, would abide by our authoritative determination." *Id.* at 701 (citation omitted).

Here, Governor Otter and the PDC members have a far more direct connection to Idaho's statewide indigent defense system than did the California governor and secretary of state in *Eu*.

*See also Back v. Carter*, 933 F. Supp. 738, 752 (N.D. Ind. 1996) (holding, in suit challenging membership requirements of judicial nominating committee, that because governor "play[ed] a role" in the committee's operations by selecting from judicial nominees the committee identifies, governor's connection was sufficient to overcome the Eleventh Amendment). The Governor not only appoints the majority of the PDC, I.C. § 19-849(1)(c), he has been and remains deeply and directly involved in its work, has been in regular communication with the PDC on systemic public defense issues, and has legal appointment authority over the State Appellate Public Defender and boards of county commissioners as well. For its part, the PDC has direct, statutory duties to establish rules governing public defenders throughout the State, I.C. § 19-850(1)(a), and is mandated to make recommendations for system-wide reform, I.C. § 19-850(1)(b).

Yet, despite these specific duties, Defendants have failed to fulfill them. As a result, Idaho's public defense delivery system continues to suffer from the same deficiencies it faced before passage of the 2014 amendments to the State's public defense statutes. These Defendants are the very state officials who "give effect" to Idaho's *statewide* public defense delivery system, and, as such, they are not immune from suit over that system. *See Wasden*, 32 F. Supp. 3d at 1148.

**A. The PDC Members Have a Direct Connection to Idaho's Public Defense Delivery System Under *Ex parte Young*.**

A statewide commissioner of an agency is a properly named defendant in a lawsuit regarding that agency's duties. *See Finstuen v. Crutcher*, 496 F.3d 1139, 1151 (10th Cir. 2007) (holding that the Oklahoma Commissioner of Health was a properly named defendant in a lawsuit challenging an amendment to a state statute preventing recognition of adoptions by

same-sex couples).[3] For instance, in *Lakeside Roofing Co. v. Nixon*, No. 4:10CV01761, 2011 WL 1465593 (E.D. Mo. Apr. 18, 2011), the court denied a motion to dismiss in a case naming the Governor of Missouri and three Commissioners of the Missouri Labor and Industrial Relations Commission. The court found that the law "provides a sufficient connection between the Commissioners and the enforcement of the Law to make the Commissioners potentially proper parties for injunctive relief." *Id.* at *4 (citation omitted). There, the Commissioners were required to provide a list of nonrestrictive states to the Department of Labor, which would in turn determine which laborers are prohibited from working state jobs during a period of excessive unemployment. *Id.* The court reasoned that "[a]lthough the Commissioners are not the final decisionmakers, the Commissioners assist in giving effect to the allegedly unconstitutional law because they make the requisite determination for what constitutes a restrictive state. Thus, the Commissioners are an indispensable part of the process of enforcing the Law and their presence in this lawsuit may be required for complete relief." *Id.*

The Idaho Public Defense Commission, as its very name suggests, is Idaho's only state agency tasked with overseeing and promulgating rules for trial-level indigent defense services in Idaho. Its members are properly named defendants under the *Ex parte Young* exception. It was established as a self-governing agency in the executive branch of state government. *See* 2d Aff. Eppink ex. 4 at D'724.

The PDC is specifically, statutorily mandated to improve Idaho's statewide public defense system. Among other things, the PDC is required to promulgate rules establishing training requirements for public defenders. I.C. § 19-850(1)(a)(i). Training requirements are essential to guaranteeing that a state's public defense delivery system is constitutionally

[3] In that case, the Governor, who was a defendant in the lower court proceedings in which the statute was held unconstitutional, did not appeal the judgment. *Finstuen*, 496 F.3d at 1142.

adequate. The American Bar Association's *Ten Principles of a Public Defense Delivery System* emphasizes the critical role of training in preparing defense attorneys to be effective advocates for their clients. *See* 2d Aff. Eppink ex. 5 at D3069 ("Defense counsel's ability, training, and experience match the complexity of the case"; "Defense counsel is provided with and required to attend continuing legal education"; "Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards."). Furthermore, the PDC developed and sponsored three statewide training programs for public defenders in 2015. *See* Aff. Thomson ¶ 9. Indeed, accompanying the passage of the 2014 amendments to Idaho's public defense statutes, the Legislature appropriated a $110,000 budget for the PDC to develop and conduct trainings for public defenders around the state. 2d Aff. Eppink ex. 9 at 7–8 (answer no. 19); *id.* ex. 6 at D'376–378. The PDC is, accordingly, intimately involved in overseeing indigent defense reform in Idaho, not just at a policy level, but on a local level as well, delivering training to individual public defenders on the ground. While these training sessions are not alone sufficient to repair the system, the PDC efforts and authority related to the training program demonstrate its close connection at all levels of Idaho's public defense system.

Likewise, the PDC has affirmative duties to ensure adequate data reporting by public defenders throughout Idaho. I.C. § 19-850(a)(ii). The PDC defendants have themselves acknowledged that making systemic, statewide improvements and monitoring the constitutional adequacy of Idaho's statewide system requires data collection and reporting. *See* 2d Aff. Eppink ex. 7 at D'366–367. In fact, the remedial injunction in a recent indigent defense class action in the State of Washington specifically ordered increased data reporting and collection. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1136 (W.D. Wash. 2013).

Another section of the Public Defense Act requires the PDC to "make recommendations to the Idaho legislature for legislation on public defense system issues including, but not limited to" core requirements for county-level contracts with private attorneys, "enforcement mechanisms," and "[f]unding issues including, but not limited to" training, data collection, and conflict cases. I.C. § 19-850(1)(b). Under the statute, the PDC was required to make a set of initial recommendations by January 20, 2015, in addition to "each year thereafter as deemed necessary by the commission . . . ." *Id.*

The PDC, furthermore, is part of an "Executive Legislative System," involving Governor's office review and approval of the PDC's proposed rules and recommendations. 2d Aff. Eppink ex. 8 at D'242. Unfortunately, the PDC has failed to meet its initial statutorily-prescribed deadline for making those recommendations, further stalling legislative action to fix the statewide system. *See* 1st Aff. Eppink ex. A at 12. The Commissioners are developing model contract language and a statewide data reporting system. *See* 2d Aff. Eppink ex. 7. Additionally, the PDC has been in regular communication with the Governor's office, county officials (including Dan Chadwick, Executive Director at Idaho Association of Counties), and the interim legislative committee on public defense. *See, e.g.,* 2d Aff. Eppink ex. 8 at D'242, ex. 10 at D'410, and ex. 11 at D'54 ("Rep. Luker indicated that the Interim Cmte. would like a list of the legislative fixes that they could make by the November date.").

Despite its clear statutory mandate, the PDC has failed to promulgate rules and provide recommendations that would have set specific standards for the state's public defense system, and thus has contributed to the ongoing failure of the system.

### B. Governor Otter Also Has a Direct Connection to Idaho's Public Defense Delivery System under *Ex Parte Young*.

A governor is a properly-named defendant in systemic reform lawsuits regarding the State's provision of indigent defense services, based on both general and specific connections. For example, in *Kitchen v. Herbert*, the Tenth Circuit held that Utah's governor was subject to suit under *Ex parte Young* because he was "statutorily charged with 'supervis[ing] the official conduct of all executive and ministerial officers' and 'see[ing] that all offices are filled and the duties thereof performed.'" 755 F.3d 1193, 1202 (10th Cir. 2014) (quoting the Utah Code) (footnote omitted). Idaho's governor bears identical responsibilities under I.C. § 67-802(1) and (2). *Cf. Estep v. Commissioners of Boundary Cnty.*, 122 Idaho 345, 346 (1992) (regarding the executive branch functions of Idaho county commissioners and other officials). Therefore, because Governor Otter is "responsible for the general supervision of the administration by the local . . . officials," he is not immune from suit. 755 F.3d at 1204 (internal quotation marks and citation omitted).

Because of similar responsibilities, Georgia's governor was a proper defendant in a suit challenging deficiencies in the state's provision of indigent defense services there. *Luckey v. Harris*, 860 F.2d 1012, 1013 (11th Cir. 1988); *see also Utah Republican Party v. Herbert*, No. 2:14-CV-00876-DN-DBP, 2015 WL 6395587, at *4 (D. Utah Oct. 22, 2015) (holding that allegations that the Governor was the supervisor of all official conduct of all executive and ministerial officers, which included the chief election official in charge of enforcement of the challenged provision of SB54, were enough to show that the Governor had "'some connection' to the enforcement of the challenged provision of SB54, and a 'particular duty' to enforce the law"); *Hall v. State of Louisiana*, 983 F. Supp. 2d 820, 832 (M.D. La. 2013) (holding that the governor and attorney general were properly named defendants because the complaint alleged

that they had "some connection with the enforcement of the 1993 Judicial Election Plan, or that they are specifically charged with the duty to enforce the Plan and are currently exercising and/or threatening to exercise that duty.).

Like the governor in *Los Angeles County Bar Association v. Eu*, Idaho's governor's connection as an appointing and supervising power over Idaho's public defense system means he is a proper defendant here. Recall that in *Eu*, California's governor was a proper defendant in a suit over limits on the number of county judges—not because the governor had power to increase or decrease the number of assignments, but merely because he had appointment powers to fill judicial vacancies. 979 F.2d at 704. Here, Governor Otter has the same appointment powers—not only to fill vacancies on the statewide Public Defense Commission, I.C. § 19-849(1)(c), but also to appoint the State Appellate Public Defender, I.C. § 19-869(2), and to fill vacancies on Boards of County Commissioners, who administer public defenders for the State in each county, I.C. § 59-906A. *See also* I.C. § 31-5203(4).

Governor Otter has far more than general responsibilities over Idaho's indigent defense system than did the governor in *Eu*. Indeed, he has other substantial and direct connections to Idaho's statewide system. First, the Governor has a long history of involvement in Idaho's public defense system, and reform of that system in particular, beginning with the Governor's creation of CJC in 2005 by way of executive order, in addition to the creation of the Public Defense subcommittee in 2009. The Governor's executive order was intended to provide policy makers and criminal justice decision makers with more accurate information that would improve public safety and general equity across the state, including in the area of indigent defense. *See, e.g.*, 2d Aff. Eppink ex. 12 at D'1150. In January of 2010, the National Legal Aid and Defender Association released a report that suggested Idaho was not adequately satisfying its Sixth

Amendment obligations. Over the next three years, the CJC committed itself to identifying improvements to be made to Idaho's public defense system. And in 2013, the CJC submitted written recommendations to the Legislature regarding specific reforms to the state's public defense system. In turn, these efforts yielded four pieces of proposed legislation focused on public defense reform. *See id.* ex. 3.

Second, the PDC was established in 2014 as a "Self-governing agency of the Executive," and the Governor sits atop the PDC's organizational hierarchy, as the top-level official responsible for Idaho's statewide public defense system. *Id.* ex. 13 at D'1173. The Governor is also the hub of the "Executive Legislative System" that the PDC follows, which requires the Governor's office to review, vet, and approve any rules, recommendations, or guidelines before they are established within the statewide system. *Id.* at ex. 8 at D'242. Naturally, therefore, the Governor's office has been in ongoing communication with the PDC since its creation in 2014. Aff. Thomson ¶¶ 14-15. Hence, the PDC, according to its own records, reports to the Governor, who bears the ultimate responsibility for the PDC's actions.

Third, Idaho's Governor has broad executive order authority, which he can use towards reforming Idaho's statewide public defense system. Just this year, Governor Otter issued an expansive executive order establishing a comprehensive "Sage-Grouse Management Plan," requiring detailed supervision and achievement of objectives throughout the state. 2d Aff. Eppink ex. 14. Also this year, the Governor authorized a brand new statewide health care program, permitting—by executive order alone—an executive branch agency to fund and implement the program as necessary. *Id.* ex. 15. The Governor may also use executive orders to ensure that local jurisdictions are complying with federal law. In 2010, for example, Governor Otter commanded Idaho's Juvenile Justice Commission to "ensure compliance," by all

"jurisdictions with public authority in Idaho," with the federal Juvenile Justice and Delinquency Prevention Act, including through "monitoring and remedial actions for violations." *Id.* ex. 16. Especially in light of Defendants' acknowledgement, in their opening brief, of "the seriousness of the issues the Plaintiffs describe," the Governor could likewise use his executive order authority to ensure compliance with the Sixth Amendment and Idaho Constitution in both criminal and juvenile proceedings in Idaho.

The Governor's connection to the State's public defense delivery system, for all of these reasons, is far more substantial than a mere generalized duty to enforce all state laws, as Defendants suggest. The Governor's real argument, instead, seems to be that he should be immune from this lawsuit because there is *no* state official who was comprehensively responsible for Idaho's system. The federal court in *HRPT Properties Trust v. Lingle* explained why such an argument must be rejected. 715 F. Supp. 2d 1115, 1127 (D. Haw. 2010). There, the court allowed a prospective suit to go forward against a state governor, notwithstanding the defendant's claim that neither he nor any of his employees were responsible for enforcing the law in question. The court held that if there is no state official specifically charged with enforcing the challenged act, "then it stands to reason that [the governor] is the person with the power to instruct state officials in the executive branch to enforce or to refrain from enforcing" the act. *Id.* This Court should similarly reject Defendants' attempts to argue that no Idaho state official could be sued to fix its public defense delivery system.

## III. Resolving Systemic Reform Litigation Is a Central Responsibility of the Judiciary.

It has been a fundamental purpose of the courts of the United States since their creation to afford citizens a method to challenge State action and seek its reform. Resolving litigation that challenges systemic constitutional deficiencies on the state level, in particular, has been a

core responsibility of the American judiciary at least since *Brown v. Board of Education*, 349 U.S. 294, 300-301 (1955). Through remedial schemes combining structural injunctions and declaratory judgments, courts have a special duty to oversee the elimination of systemic constitutional violations by states both "root and branch." *See Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968). Although state and local authorities bear primary responsibility for managing their affairs, courts must act when those authorities fail to meet their affirmative obligations. *See Milliken v. Bradley*, 433 U.S. 267, 280–281 (1977). As the Supreme Court recently reaffirmed, plaintiffs challenging statewide constitutional failures need not base their case on individual local violations, but instead may rely on the existence of system-wide deficiencies. *Brown v. Plata*, 131 S. Ct. 1910, 1925 n.3 (2011).

Idaho courts are no strangers to this kind of systemic reform litigation. In the face of the State's repeated failure to correct constitutional deficiencies in Idaho's educational system, the Idaho Supreme Court stepped in—five times—and expressly reaffirmed the courts' "duty to determine whether the current funding system passes constitutional muster" in upholding this District Court's judgment declaring the system unconstitutional. *ISEEO V*, 142 Idaho at 453, 459–460. The Idaho Supreme Court, in *Hellar v. Cenarrusa*, likewise upheld a district court's declaration invalidating the 1982 reapportionment of the Legislature as violating the Idaho Constitution. 106 Idaho 571, 575 (1984). In fact, the Idaho Supreme Court went on to enter its own declaration striking down a later reapportionment, and entered an order prescribing a specific reapportionment plan. *Id.* at 585. Several years after *Hellar*, the Court made clear that "[p]assing on the constitutionality of statutory enactments, even enactments with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison* . . . . Constitutional rights, as well as this Court's duty to faithfully interpret our

constitution and the federal constitution, do not wane before united efforts of the legislature and the governor." *Miles v. Idaho Power Co.*, 116 Idaho 635, 640 (1989). Here, Plaintiffs ask this Court to do just that: pass upon the constitutionality of Idaho's public defense services, as reflected in the statutory enactment of the Public Defense Act and the actions (and omissions) of Defendants for ensuring that the constitutional guarantees of adequate indigent defense are carried out in this state.

Systemic reform litigation specifically concerning public defense systems is also familiar territory for state courts. In *Hurrell-Harring v. State of New York*, New York's highest court affirmed the denial of a motion to dismiss a complaint raising issues nearly identical to those alleged in the complaint in this case. 15 N.Y.3d 8, 27 (2010). The court rejected the State's argument that "a claim for systemic relief of the sort plaintiffs seek will involve the courts in the performance of properly legislative functions," and denied the State's motion to dismiss despite that the New York Legislature had "left the performance of the State's obligations under *Gideon* to the counties, where it is discharged, for the most part, with county resources and according to local rules and practices." *Id.* at 15-16. Likewise, in Michigan, the Court of Appeals stated that "it is the state that ultimately has the affirmative constitutional obligation to implement a system that safeguards the right to counsel . . . ." *Duncan v. State*, 774 N.W.2d 89, 136 n.24 (Mich. Ct. App. 2009), *aff'd in result*, 832 N.W.2d 761, 765 (Mich. Ct. App. 2013). Accordingly, the *Duncan* court held that "[i]f a county system is constitutionally inadequate," and the court hears the evidence and finds "widespread and systemic instances of deprivation of counsel and deficient performance resulting from a flawed county system of providing indigent representation, but the county is in full compliance with existing state law and mandates, the cause of the constitutional deficiencies will necessarily flow from failures by the state." *Id.*

The very same logic applies here. In this instance, just as in other systemic reform litigation in Idaho state courts, the ultimate question at issue is not whether implementation in individual local jurisdictions is adequate, but whether the State has provided an adequate means for local jurisdictions to provide constitutionally sufficient services. *See ISEEO V*, 142 Idaho at 455. It has not. The law is clear that where a state seeks to "commit[] the details of its operation to local officers," it must first provide "suitable machinery" that will enable such officials to fulfill the legal obligation in question. *Fenton v. Bd. of Commissioners of Ada Cnty.*, 20 Idaho 392, 403 (1911). Plaintiffs in this case allege that the State has not provided the counties with suitable machinery to provide constitutionally adequate public defense. Accordingly, "the issue is systemic in nature," and the District Court may make generalized findings. *ISEEO V*, 142 Idaho at 455. Here, just as the Idaho Supreme Court has had to point out before in this kind of litigation, "the State fails to grasp the relevance of the adage 'the whole is greater than the sum of its parts.'" *Id.*

Finally, litigating these important issues on a county- or city-level basis would be inefficient, duplicative, expensive, and time-consuming. As such, Plaintiffs have specifically tailored the relief they are requesting to avoid imposing an unreasonable burden on either the State or the Court. To the extent that enforcement will require, at the outset, efforts to craft a workable plan, the State has in place both the people and programs that would allow it to assign and complete that work quickly. Indeed, just as Defendants were able to provide the resources to litigate this matter on behalf of the entire State, it can utilize those resources to propose an interim plan here, and by doing so, reduce the overall burden on the State. While Plaintiffs believe this approach is preferable—and indeed advantageous for Defendants—the Court, if

necessary, has the authority to invoke its equitable powers to require the State to craft a litigation and discovery plan.

At bottom, the State of Idaho should not be permitted to prevail on technical points about the scope and duties of certain State-level employees, in an effort to obscure its fundamental obligations to indigent Idaho defendants.

## IV. When a Statewide System of Constitutional Compliance Has Failed, It Is the Judiciary's Unique Responsibility to Declare It.

Idaho's declaratory judgment statutes are "broad and comprehensive," *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 797–798 (1944), and must be "liberally construed and administered," I.C. § 10-1212. Their express purpose is to "afford relief from uncertainty and insecurity with respect to rights . . . ." *Id.*

The declaratory judgment statutes begin, in fact, with a decisional rule that disposes of the State's argument: "No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." I.C. § 10-1201. As the State acknowledges in its brief, a Court may refuse to enter a declaratory judgment only when a declaration "would not terminate the uncertainty or controversy giving rise to the proceeding." I.C. § 10-1206. The uncertainty that gives rise to this proceeding is whether the State's system for ensuring the right to counsel throughout Idaho's 44 counties is constitutional as is, or whether the State must adjust that system.[4] There would, however, be a genuine I.C. § 10-1206 issue if this class action were

[4] The commissioners of the Public Defense Commission can adjust that system by promulgating rules governing training requirements for public defenders and issuing recommendations through the "Executive Legislative System." 2d Aff. Eppink ex. 8 at D'242. (Indeed, even were the plaintiffs to petition the Commission for rulemaking, the Governor's review and approval would still be needed under that "Executive Legislation System.") The Governor can also make even more sweeping adjustments by Executive Order. *See, e.g.,* 2d Aff. Eppink exs. 14–16. And the State of Idaho, which is the plaintiff in every criminal case in state court, can do so by taking

forced into a county-by-county approach. For, even if a court were to declare, as part of this action or a separate one, that individual counties were not complying with constitutional or statutory requirements, it would not terminate the root uncertainty that the plaintiffs raise in the existing complaint: whether the statewide system itself is constitutionally adequate.

A statewide declaratory judgment would terminate that root uncertainty. As the Idaho Supreme Court explained in *Wylie v. State*, declaratory judgment actions are properly dismissed only where "the judgment, if granted, would have ***no effect*** either directly or collaterally on the plaintiff, the plaintiff would be unable to obtain further relief based on the judgment and no other relief is sought in the action." 151 Idaho 26, 31 (2011) (emphasis added) (quoting *ISEEO v. Idaho State Bd. of Educ.*, 128 Idaho 276, 282 (1996) [hereinafter *ISEEO II*]). This Court's declaration that Idaho's system is currently operating below constitutional thresholds would have a direct effect on the plaintiff class because it would require the State to meet those thresholds before it could continue to prosecute indigent criminal defendants. Class members could obtain immediate further relief based on the judgment, through stays and other appropriate temporary relief in their criminal proceedings until the State dispatched the resources and rules needed for constitutional compliance. Alternatively, if this Court determines, after hearing all of the evidence, that Idaho's statewide system is operating at or above constitutional thresholds, the judgment would resolve the question whether Idaho has systemic problems, rather than merely local deficiencies. *Cf.* I.C. § 10-1201 ("The declaration may be either affirmative or negative in form and effect . . . ."). Either way, the class complaint would be redressed, at least in part, by a declaratory judgment.

In short, either the statewide public defense system in Idaho is constitutional or it is not.

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actions to ensure that criminal caseloads and workloads do not exceed constitutional limits, given the number and experience of public defenders available throughout the state.

The time for making that decision will come once the evidence is developed and presented. The question now, though, is whether a declaratory judgment action may proceed at all. To decide that question, this Court only considers whether the uncertainty about the statewide system's constitutionality presents "a real and substantial controversy" or merely a hypothetical one. *Miles v. Idaho Power Co.*, 116 Idaho 635, 642 (1989); *see also Harris v. Cassia Cnty.*, 106 Idaho 513, 516–517 (1984). With Defendant Governor Otter himself having stated on the record to the Idaho public that "our current method of providing legal counsel for indigent criminal defendants does not pass constitutional muster," the question is very real and quite substantial.[5] 2d AFf. Eppink ex. 2 at 8. In systemic reform class litigation, which raises "matter[s] of great fundamental importance," it is imperative that the courts resolve constitutional uncertainties, and the Idaho Supreme Court has recognized a public interest justiciability exception to ensure these kinds of cases are heard. *ISEEO II*, 128 Idaho at 284. In any event, deferring this real and substantial question to county-level litigation would achieve nothing because, even if the Court concluded that public defense in a particular county is inadequate, it will still not be certain whether it is the county's fault or just a localized symptom of a statewide, systemic deficiency. *See Duncan*, 774 N.W.2d at 136 n.24. Thus, because a declaration about the adequacy of the statewide system in Idaho will "remove an uncertainty" about the constitutionality of indigent defense in Idaho, Plaintiffs' declaratory judgment action must proceed to further discovery and

[5] The State's entwined argument that declaratory relief is not available if injunctive relief is not also available is flatly rejected by statute: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, ***whether or not further relief is or could be claimed.***" I.C. § 10-1201 (emphasis added); *see also Steffel v. Thompson*, 415 U.S. 452, 471 (1974) ("engrafting [on] the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied before the issuance of a declaratory judgment is considered would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate"); I.C. § 10-1215 (requiring Idaho's declaratory judgment statutes be interpreted "to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees").

adjudication. *See* I.C. § 10-1205.

## V. Plaintiffs' Suit Complies With Idaho Rules of Civil Procedure 3(b) and 65(d).

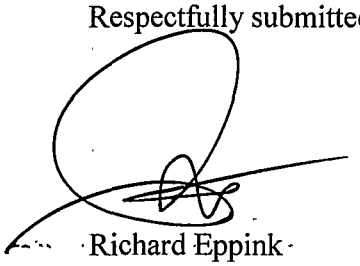
Plaintiffs' lawsuit complies fully with the mandates of I.R.C.P. 3(b) because the suit names Governor Otter and the individual members of the PDC as defendants. Rule 3(b) specifies that government officials "shall not be designated as parties in any capacity unless the action is brought against them individually or for relief under Rules 65 or 74." Plaintiffs named Governor Otter and the individual PDC members as defendants in this case.

Defendants' reliance on *Weyyakin Ranch Prop. Owners' Association Inc. v. City of Ketchum*, 127 Idaho 1, 896 P.2d 327 (1995) is misguided. While the language in *Weyyakin* correctly explains the interplay between I.R.C.P. 3(b) and 65(d), the plaintiffs in that case sued only the City of Ketchum, rather than the elected officials individually, thereby violating the Rule. That is not the case here, where Plaintiffs have sued the relevant state officials individually. Defendants obviously disagree as to which individual state officials could be properly sued for the State's failure to provide a constitutionally adequate indigent defense system, and seem to suggest that members of the Idaho Legislature would have to be named in the lawsuit in order for Plaintiffs to get the relief requested in their Complaint. But that is the very issue being decided by this Court. The fact that Defendants believe it to be "obvious" that the Governor and Commissioners have been named improperly does not make it so.

* * * * *

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendant's motion to dismiss and allow all discovery to proceed in this matter.

Respectfully submitted this 24th day of November, 2015.



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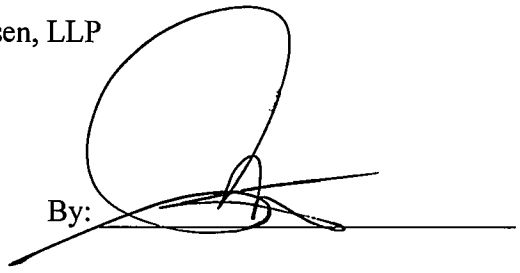
By: 

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ORIGINAL

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA**

| | |
|---|---|
| TRACY TUCKER, *et al.*, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IDAHO, *et al.*,<br><br>Defendants. | **Case No. CV OC 1510240**<br><br>**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** |

Defendants (1) the State of Idaho, (2) Governor C.L. "Butch" Otter, and (3) the seven members of the Public Defense Commission (PDC) file this Reply Memorandum in support of Defendants' Motion to Dismiss the Complaint. This Reply is accompanied by an Objection and Motion to Strike Plaintiffs' Affidavits and Exhibits. However, Defendants cannot know before their argument whether their Objection and Motion to Strike will be granted. Thus, this Reply

addresses the Affidavits and Exhibits as a fallback argument in case the Objection and Motion to Strike is denied in full or in part, but Defendants' primary argument is that the Affidavits and Exhibits should not be considered at all.

## I. OVERVIEW OF REPLY ARGUMENT

Under 42 U.S.C. § 1983, plaintiffs may bring Federal claims against "persons", *i.e.*, so-called State actors, "who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subject[], or cause[] to be subjected, any ... person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States] ... ."

Plaintiffs agree that Idaho itself cannot be sued under § 1983. Response to Defendants' Motion to Dismiss (Response), p. 3, n.1 ("the State of Idaho itself is not a 'person' for purposes of prospective injunctive relief under ... § 1983"). Because Idaho cannot be sued under § 1983, Plaintiffs' Federal claims are reduced to whether the Complaint alleged facts showing that the Governor or PDC members personally subjected or caused any Plaintiff to be subjected to deprivation of their Sixth Amendment right to counsel. The Governor and PDC members have taken no action or inaction regarding public defense services that would allow the Court to provide relief against them under § 1983, so the Federal law claims against the Governor and PDC members must be dismissed because Plaintiffs have no case or controversy with these Defendants.

The issue of whether Idaho may be sued for deprivation of the right to counsel found in Idaho Const., Article I, § 13, has never been addressed in a published opinion of the Idaho Supreme Court. However, for the sovereign immunity, prudential, and separation-of-powers reasons given in the Argument below, the Court should dismiss the State law claims against Idaho. Further, because neither the Governor nor the PDC can provide the State law relief prayed for in the Complaint, the Court should likewise dismiss the State law claims against them.

The issue before the Court is not whether the Complaint has alleged ***some*** Federal or State constitutional violation regarding provision of public defender services. For purposes of the Motion to Dismiss, the Court may assume that some Plaintiff alleged facts that if true would allow the Court to determine that he or she was denied his or her constitutional right to counsel.

"The facts of this case are not at issue because [defendant] accepts the facts [plaintiff] alleged in its complaint as true for the purposes of its 12(b)(6) motion ... ." *ABC Agrs, LLC v. Critical Access Group, Inc.*, 156 Idaho 781, 782, 331 P.3d 523, 524 (2014). The issue thus becomes: Are Plaintiffs seeking a remedy against the named Defendants that is consistent with Federal and/or State law. The Argument below shows that they are not.

## II. FEDERAL CLAIMS AGAINST THE GOVERNOR AND PDC MEMBERS SHOULD BE DISMISSED FOR LACK OF A CASE OR CONTROVERSY BECAUSE THEY CANNOT PROVIDE THE REDRESS SOUGHT IN THE COMPLAINT'S PRAYERS FOR RELIEF

Before addressing why neither the Governor nor PDC members can provide the redress prayed for in the Complaint and why the Federal law claims against them should be dismissed, Defendants first address the common practice of metonymy[1] in which the words "the State" are often used interchangeably with or as shorthand for the words "State actors."[2] To take an example from the Response, "[I]n paragraph 3 of the Complaint, Plaintiffs defined 'State' to refer to all Defendants throughout the Complaint," Response, p. 2, n.1, *i.e.*, the Complaint used the term "the State" to include two sets of State actors — the Governor and the PDC members.

Appellate courts often use the words "the State" to refer to State actors generally, not necessarily to a State of the Union itself. *E.g.*, prison officials sued over whether they provided adequate law libraries or acceptable alternatives were called "the State" in *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977),[3] cited Response, p. 4; there were numerous references to constitutional limitations upon or constitutional requirements imposed upon "the State" in a suit against Federal officers, including the Administrator of Veterans' Affairs, *Walters v. National*

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[1] Metonymy is "a figure of speech consisting of the use of the name of one thing for that of another of which it is an attribute or with which it is associated (as 'crown' in 'lands belonging to the crown')." Merriam-Webster's Collegiate Dictionary, p. 782 (11th ed. 2003). "For instance, 'Wall Street' is often used metonymously to describe the U.S. financial and corporate sector, while 'Hollywood' is used as a metonym for the U.S. film industry ... ." https://en.wikipedia.org/wiki/Metonymy.

[2] "State actors" need not be officers or employees of the State itself; city and county officers and employees acting under color of State law are "State actors." *Padgett v. Wright*, 516 F. App'x 609, 611 (9th Cir. 2013) (mayor acting in his official capacity was a state actor); *Allied Bail Bonds, Inc. v. Cty. of Kootenai*, 151 Idaho 405, 413-14, 258 P.3d 340, 348-49 (2011) (county sheriff was a state actor).

[3] The State officers who were sued are listed in *Smith v. Bounds*, 538 F.2d 541 (4th Cir. 1975).

*Ass'n of Radiation Survivors*, 473 U.S. 305, 105 S. Ct. 3180, 3195 (1985), cited Response, p. 4; there were references to "the State" in a suit against a city, *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 103 S. Ct. 2979 (1983), cited Response, p. 5. Thus, courts often metonymically refer to "the State" without literally meaning a State of the Union.

Defendants concede based upon the cases cited at Response, pp. 3-6, that some "State actor(s)" (as broadly defined) is or are responsible for providing indigent defense in Idaho trial courts. They do not concede that the Governor, the PDC members, or any other State Executive Officer is such a State actor. Importantly, despite the sweeping use of the words "the State" in Plaintiffs' cases, not one case cited at Response, pp. 3-6, holds that the Sixth Amendment requires a State of the Union or one of its officers to be responsible for ensuring that there are constitutionally adequate public defender services throughout the State.[4]

Cases cited later do not supply what is missing from pages 3-6. Response, p. 7, cites two Idaho cases and concludes that the "counties' failure to fulfill State responsibilities ... ultimately

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[4] Plaintiffs quote the Recommendations of the Public Defense Subcommittee of the Criminal Justice Commission, adopted May 13, 2013, as follows:

> As with other rights that are fundamental and essential to a fair trial, the vindication of the Sixth Amendment right to counsel is a state responsibility. Although a state may delegate its duty to apprise citizens of this right to counties, it is ultimately the state's responsibility to ensure that the constitutional obligation is met.

Response, p. 7, quoting from Second Eppink Aff., Ex. 3. This quotation was part of a larger report that included recommendations for legislation for the 2014 Session. As with any report recommending legislation, its focus and conclusions were ***legislative*** or ***political***, not judicial; it may well be that its members believe that the State has a ***political*** responsibility for the public defense system. That is a far cry from whether Federal or State law places ***legal*** responsibility on the State or on specific State actors. In the end, neither the Commission nor its Subcommittee has authority to determine who has legal responsibility for public defense; that is a matter for the Courts. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803).

Further, the Subcommittee's comments that accompanied its proposed legislation preceded the 2014 amendments to the Public Defender statutes. See 2014 Idaho Session Law, chapter 247, adding the Public Defense Act to the Idaho Code. The Subcommittee was not describing the system now in place; it was describing the system that preceded enactment of legislation along the lines that it proposed.

Lastly, Plaintiffs describe the Criminal Justice Commission as the Governor's "own" Commission. It is accurate that the Governor created the Commission by Executive Order. Executive Order 2015-10, dated September 23, 2015, Idaho Administrative Bulletin, No. 15-12, pp. 23-26. However, only four of the Commission's ten ex officio members are direct gubernatorial appointees; only three of the nine direct gubernatorial appointees are unrestricted because the rest must represent specified entities; the Legislature and the Judiciary appoint the remaining seven members. The Commission represents all three branches of government and other interests as well. It is not the Governor's "own".

lies at the feet of the State." But no Idaho case cited on page 7 (or any other case that Defendants know) holds that the State is legally responsible for a county not performing a duty placed on the county by law. Response, p. 8, cites *Stanley v. Darlington County School District*, 84 F.3d 707, 713 (4th Cir. 1996), for the proposition that when local schools did not desegregate, the State was not absolved of responsibility to cure the constitutional violation. However, this *dicta* came from a case in which "neither the original plaintiffs nor the United States ever sued the State," *id.* at 711, so there was no reason to opine on the State's responsibility. Further, *Stanley's dicta* was contemporaneous with the United States Supreme Court's reinvigoration of the Eleventh Amendment, which made it clear that private parties could not sue States in Federal Court. *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996). Needless to say, *Stanley*'s *dicta* that the State would be responsible in a Federal Court suit for a school district's constitutional failings is an outlier that has not been taken up by other Federal Courts of Appeal.

*Robertson v. Jackson*, 972 F.2d 529 (4th Cir. 1992), *Woods v. United States*, 724 F.2d 1444 (9th Cir. 1984), and *Kreulle v. New Castle Cnty. Sch. Dist.*, 642 F.2d 687 (3rd Cir. 1981), cited Response, pp. 8-9, do not help Plaintiffs. They involved States' voluntary participation in Federal social or educational spending programs. The United States can condition acceptance of Federal funds on the State's consent to suit over the administration of those programs. See discussion in *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686-87, 119 S. Ct. 2219, 2231 (1999) (Congress may require waiver of State's sovereign immunity or agreement to suit as a condition of acceptance of Federal funds). Federal statutes may allow or require a State officer who administers a Federal spending program to be subject to suit over State or local administration of the program; that does not mean that the Sixth Amendment requires the State to have an officer who may be sued over provision of public defense services. Thus, these cases do ***not*** stand for the proposition that "responsibility under the Sixth Amendment lies with the State, which cannot abdicate its constitutional duty by ... delegating administrative responsibility for public defense to the counties," Response, p. 9, because Federal spending programs, not the Sixth Amendment, were at issue in *Robertson*, *Woods*, and *Kruelle*.

This Court does not have a Federal constitutional command to entertain "litigation that challenges systemic constitutional deficiencies at the state level," Response, p. 18, when there is no State officer who, in the words of § 1983, "deprives" Plaintiffs of their constitutional rights. While it is true that the United States Supreme Court did not require individual prisoners to bring individual claims for systemic failures in delivery of mental health services in the California prison system, *Brown v. Plata*, 563 U.S. —, 131 S. Ct. 1910 (2011), cited Response, p. 19, the systemic failure at issue there was in ***State*** prisons (*i.e.*, there was no claim of a systemic failure in State prisons ***and*** in city and county jails), so of course there were State officers responsible for the entire State prison system who were amenable to suit. There is no such State officer here.

Neither *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 930 N.E.2d 217 (2010), nor *Duncan v. Michigan*, 284 Mich.App. 246, 774 N.W.2d 9 (2009), cited Response, p. 20, create a right to mount a statewide challenge to the adequacy of public defense services under § 1983.

*Hurrell-Harring* (*H-H*) was a challenge to provision of public defense services in five New York counties, not statewide. 15 N.Y.3d at 15, 25, 26-27. *H-H* cited the Sixth Amendment, but § 1983 and its standards for Federal suit were never mentioned, probably because the primary defendant — the State of New York — is not a person who can be sued under § 1983. The rationale for suing the only other defendant — the Governor[5] — under § 1983 likewise was not discussed. Whatever else one can say about *H-H*, it was not grounded in § 1983.

Neither was *Duncan* in the end grounded in § 1983. *Duncan's* puzzling, history is recounted in *Duncan v State*, 300 Mich.App. 176, 832 N.W.2d 761 (2012), a 2012 Michigan Court of Appeals opinion issued two years after the Michigan Supreme Court decisions. The 2009 Court of Appeals decision, 284 Mich.App. 246, 774 N.W.2d 9, cited Response, p. 20, allowed the State and the Governor to be sued over provision of public defender services. The State was sued under the Michigan Governmental Tort Liability Act, 284 Mich.App. at 266-71, 774 N.W.2d at 104-06, and the Governor was sued under § 1983, 284 Mich.App. at 271-76, 774

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[5] *Hurrell-Harring v. New York*, 66 A.D.3d 84, 86, n.1, 883 N.Y.S.2d 349, 350, n.1 (2009), *aff'd as modified*, 15 N.Y.3d 8, 930 N.E.2d 217 (2010) (Governor added as a defendant without any discussion why he was an appropriate defendant under Federal law).

N.W.2d at 106-09, without any discussion of his authority to redress Plaintiffs' claims.

The Court of Appeals was then affirmed, reversed, and affirmed by the Supreme Court of Michigan in that order. See 486 Mich. 906, 906, 780 N.W.2d 843, 844 (2010) (affirming "result only of the Court of Appeals majority for different reasons"); 486 Mich. 1071, 1071, 784 N.W.2d 51, 51 (2010) ("The defendants are entitled to summary disposition because, as the Court of Appeals dissenting opinion recognized, the plaintiffs' claims are not justiciable"); and 488 Mich. 957, 866 N.W.2d 407 (2010) ("we REINSTATE our order" cited first in this list),[6] as explained in 300 Mich.App. at 183-84, 832 N.W.2d at 765. Like *H-H*, § 1983 and its standards for suing the only named Defendants — the State and the Governor — are never discussed by the Michigan Supreme Court, which affirmed the Court of Appeals "for different reasons".

Other States have declined to follow *H-H* and *Duncan*. *Flora v. Luzerne County*, 103 A.3d 125, 134-37 (Pa.Commw. 2014), noted that *H-H* was a 4-3 decision and that *Duncan* was 2-1 in the Court of Appeals and concluded that the dissents were better reasoned, in part because:

> First, there is no precedent from the United States Supreme Court acknowledging that a constructive denial of counsel claim may be brought in a civil case that seeks prospective relief in the form of more funding and resources to an entire office, as opposed to relief to individual indigent criminal defendants. *Strickland*, *Cronic*, and *Gideon* were all cases where the defendants sought a new trial. As explained in the *Duncan* dissent, the "United States Supreme Court in Gideon and Strickland was concerned with results, not process. It did not presume to tell the states how to ensure that indigent criminal defendants receive effective assistance of counsel." *Duncan*, 774 N.W.2d at 153 (Whitbeck, J., dissenting). It is unclear that such a claim will be held cognizable in any state.

103 A.3d at 136. Thus, in the end there is no basis for allowing suit against ***some*** State officer just because Plaintiffs have alleged a statewide, systemic problem. Instead, Plaintiffs must show the grounds for suing the specific State officers named as Defendants. They have not.

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[6] The last order was issued not long before some members of the majority left office and were replaced with the winners of an intervening election. As a dissenter to the last opinion explained:

> The majority has decided to grant the motion for reconsideration, and to reverse our previous order, without affording disagreeing Justices sufficient time to adequately respond to this decision. Instead, the majority has now decided to expedite the release of its order .... ... The Court's decision to suddenly expedite this case seems designed to prevent the new Court after January 1, 2011 from considering a motion for reconsideration.

*Duncan v. State*, 488 Mich. 957, 958, 866 N.W.2d 407, 407-08 (2010) (Corrigan, J., dissenting).

### A. The Governor Is Not "Connected" to Delivery of Public Defense Services and Cannot Be Enjoined to Provide the Relief Requested; Therefore, the Federal Claims Against Him Should Be Dismissed for Lack of a Case or Controversy

The Sixth Amendment guarantees at least seven rights in criminal prosecutions.[7] Plaintiffs contend that the Governor is responsible for the last one — assistance of counsel— but do not explain how this responsibility can be cabined off from the rest. The answer, of course, is not that the Governor is personally responsible for the State meeting all seven Sixth Amendment constitutional responsibilities, but that he is not personally responsible for any of them. The Governor does not, in the words of Response, pp. 9-10, "give effect" to the Sixth Amendment.

There is no vicarious liability under § 1983; to be sued, a Defendant must be actively connected with the alleged deprivation of rights. As the Supreme Court said in *West v. Atkins*, 487 U.S. 42, 54-54, 108 S. Ct. 2250, 2257-58 (1988), a case involving suit against a State prison's medical supervisor over whether prisoners received constitutionally required medical care: "[F]ew of those with supervisory and custodial function are likely to be involved directly in patient care. ... § 1983 is not available under the doctrine of *respondeat superior*."

What do Plaintiffs say about the Governor's involvement in public defense issues? The Governor is not mentioned in Complaint ¶¶ 3-84, where Plaintiffs lay out their facts. No amount of legal argument can overcome this omission: Plaintiffs do not allege any facts personal to them showing the Governor's deprivation of their right to counsel. Instead, they try to construct a legal argument to substitute for their lack of facts. That legal argument is not enough.

Defendants begin with *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697 (9th Cir. 1992). Response, pp. 9-11. In this judicial *tour de force*, the Ninth Circuit entertained a Federal claim by the Los Angeles Bar Association that "challenge[d] the constitutionality of a California statute which prescribe[d] the number of judges on the Superior Court for Los Angeles County" on the

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[7] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a [1] speedy and [2] public trial, by an [3] impartial jury ..., and to be [4] informed of the nature and cause of the accusation; to be [5] confronted with the witnesses against him; to have [6] compulsory service for obtaining witnesses in his favor, and to have [7] the Assistance of Counsel for his defense.

ground that "a shortage of state court judges causes inordinate delays in civil litigation, depriving litigants of access to the courts." *Id.* at 699. The Court concluded that neither the Governor, who could not create judgeships himself, but would appoint judges to newly created judgeships, nor the Secretary of State, who could not create judgeships herself, but would certify newly created judgeships in future elections, should be dismissed even though neither could redress the number of judgeships themselves; instead, the Court found it likely that California Legislature, which was not a party, would abide by the Court's decision to increase judgeships if it came to that. *Id.* at 701. To say that this stretches the notion of redressability that underlies standing is an understatement. But, the Ninth Circuit insulated the extraordinary reach of its standing analysis by denying relief on the merits, thus precluding the Governor or Secretary of State from obtaining Supreme Court review because there was no judgment against them.

Later Ninth Circuit decisions are not so expansive. *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 847 (2002) (plaintiffs could not sue Governor and Secretary of State with no enforcement authority over anti-trapping initiative); *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 398 (2014) (same result for Governor with regard to anti-*foie gras* law). In light of decisions like these, what legal arguments do Plaintiffs make to connect the Governor with provision of public defense services when they had no factual allegations of his personal involvement?

They say the Governor "[1] appoints a majority of the PDC, ... [2] remains deeply and directly involved in its work, ... [3] has legal appointment authority over the State Appellate Defender and [4] boards of county commissioners." Response, p. 11. To quote Gertrude Stein, "There is no there there." Even if the PDC had the remedial powers that Plaintiffs seek (it does not), it is a ***self-governing*** agency, Idaho Code § 19-849(1), not an agency subject to gubernatorial supervision. Its four gubernatorial appointees serve fixed, three-year terms and do not serve at the pleasure of the Governor. § 19-849(3)(a). Three of its seven members are appointed by the Legislature or by the Chief Justice, § 19-849(1)(a)-(b), so there would be serious separation-of-powers issues if the PDC were not self-governing and were subject to gubernatorial control.

Even if the Governor were "deeply and directly involved" in the PDC's work" (there is no such allegation of fact in the Complaint), that would be beside the point: He has no statutory authority to tell a self-governing agency what to do.[8]

As for the Governor appointing the State Appellate Public Defender, what comes from that? Nothing, because this is a case about trial defense, not about appellate defense.[9] Lastly, the Governor can appoint a County Commissioner only when there is a vacancy in office and only from a list provided by the County Central Committee of the party of the County Commissioner whose office became vacant. Idaho Code § 59-906(1). No statute gives the Governor authority to tell a County Commissioner what to do. Plaintiffs' four observations about the Governor's powers come to nothing; they do not connect him with trial public defense.

Plaintiffs cite *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014), for the proposition that "a governor is a properly-named defendant in systemic reform lawsuits regarding the provision of indigent defense services." *Kitchen* was a challenge to Utah's "anti-gay marriage" laws; the *Kitchen* Court analyzed the Governor's claim of authority over county clerks and their issuance of marriage licenses to conclude that he had statutory authority to enforce marriage laws and thus was amenable to that suit. *Id.* at 1202. Needless to say, analysis of Utah's domestic relations law does not show that Idaho's Governor has similar authority over Idaho's county commissioners when it comes to public defense services.

*Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), Response, p. 15, might help Plaintiffs if not for subsequent developments. The *Luckey* plaintiffs sued the Governor of Georgia, two chief judges of Georgia judicial circuits, and "all Georgia judges responsible for providing assistance

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[8] A Public Defense Commission organizational chart, bearing the name of its since-departed Executive Director Ian Thompson and showing Governor Otter above the seven PDC members, is cited at Response, p. 17. The disgruntled Mr. Thompson's chart and affidavit do not show that "the Governor sits atop the PDC's organizational hierarchy" or that "the PDC, according to its own records, reports to the Governor, who bears the ultimate responsibility for the PDC's actions." Response, p. 17. Lines of legal responsibility for statutory agencies come from statute, not from affidavits and charts.

[9] The State Appellate Public Defender is also in the Department of Self-Governing agencies. Idaho Code § 19-869(1). Surely, Plaintiffs are not arguing that the Governor is entitled to tell the State Appellate Public Defender how to do her job. But, that would the logical extension of their argument that the Governor can tell the PDC how to do its job.

of counsel to indigents criminally accused in the Georgia courts." *Id.* at 1013. The Eleventh Circuit determined that the defendants were proper because "the governor is responsible for law enforcement ... and is charged with executing the laws faithfully ... [and] has the residual power to commence criminal prosecutions ... and has the final authority to direct the Attorney General to 'institute and prosecute' on behalf of the state. ... Judges are responsible for administering the system of representation for the indigent criminally accused." *Id.* at 1016. The Court did not explain how the Governor could wear two hats and be responsible for prosecution and for public defenders. In the end, however, this case never proceeded to judgment. Four years later the Eleventh Circuit affirmed the District Court's decision to abstain from considering the *Luckey* complaint and to dismiss. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992). Like *Eu*, this is another case where no Governor was ordered to do anything in the end.

Plaintiffs cite the last two Governors' interests in improving the public defense system as proof that Governor Otter "has far more than general responsibilities over Idaho's indigent defense system" and "has other substantial and direct connections to Idaho's statewide system." Response, p. 16. In other words, according to Plaintiffs, when Governors take on the thankless political task of trying to improve the public defense system, they become legally responsible to do so. There is no rule of law that Plaintiffs can cite for that proposition, nor should there be the perverse incentive that Plaintiffs in effect propose: Governors who do not ignore a problem and address the problem in the political arena then become subject to suit in the judicial arena.

The Governor's authority to appoint four members of the self-governing Public Defense Commission, to appoint the appellate public defender, and to fill vacancies in County Commissions are repeated, Response, p. 16, but they are no more persuasive than they were on Response, p. 11, because they do not give the Governor authority over county public defense services. The Governor's creation of the Criminal Justice Commission by Executive Order, Response, pp. 16-17, should be lauded for what is — a political commitment to improve the justice system, including public defender services — and not be hung as an albatross around his neck for what it is not — a statutory or constitutional obligation to be in charge of public defense services.

Plaintiffs cite the Governor's Executive Orders for Sage Grouse Management and Treatment-Resistant Epilepsy to support the proposition that he "has broad executive authority, which he can use towards reforming Idaho's statewide public defense system." Response, pp. 17-18, That conclusion does not follow from these Executive Orders. Executive Order 2015-04, Idaho Administrative Bulletin, Vol. 15-8, p. 16 (August 5, 2015), 2nd Eppink Aff., Ex. 14, directs "all executive agencies, to the extent consistent with existing state law," to implement a sage grouse management plan; it is not directed to any county officer. Executive Order 2015-03, Idaho Administrative Bulletin Vol. 15-5, p. 20 (May 6, 2015), 2nd Eppink Aff., Ex. 15, is directed to the Department of Health & Welfare and instructs it to investigate and implement, if appropriate, expand access to an FDA-approved drug for epilepsy. The Executive Orders, which direct agencies to work within existing law, do not show that the Governor has broad executive authority to reform the counties' public defender systems in a manner not provided by existing law.

Plaintiffs say: "The Governor's real argument ... seems to be that he should be immune from this lawsuit because there is *no* state official who was comprehensively responsible for Idaho's system." Response, p. 18. Almost, but not quite. The Governor adds that there ***are*** State actors who are responsible for county public defender services; they are subject to suit, he is not.

Thus, this case is not like *HRPT Properties Trust v. Lingle*, 715 F. Supp. 2d 1115 (D. Haw. 2010), Response, p. 18, where no local official had authority to enforce Act 189 concerning negotiation of terms in a commercial lease and the Governor "decides whether and to what extent to enforce Act 189. She has the power to direct or prohibit enforcement, or to advise agencies or individuals to issue regulations, standards, or directives relating to Act 189." 715 F. Supp. 2d at 1127. Here, Idaho Code §§ 19-859 through 19-864 place responsibility for the public defender system on county officials, and the Governor is not a "default" defendant (if there is such a thing) who can be sued when no one else can be sued. *HRPT* does not apply. As noted in the Opening Brief, the Governor cannot be sued under § 1983 because he cannot provide the redress that Plaintiffs seek.

**B. The PDC Does Not Have Statutory Authority to Provide the Relief Requested; Therefore, the Federal Claims Against Its Members Must Be Dismissed for Lack of a Case or Controversy**

In Idaho, a statutory agency's "powers and jurisdiction derive in entirety from the enabling statutes." *United States v. Utah Power & Light Co.*, 98 Idaho 665, 667, 570 P.2d 1353, 1355 (1977). Thus, one must look to Idaho Code § 19-849 and § 19-850 to determine what the PDC's members may be enjoined to do under § 1983, *i.e.*, how can PDC members be ordered to exercise their authority under color of State law so as not to deprive or cause a Plaintiff to be deprived of Sixth Amendment rights. The PDC members can be enjoined only if they can "give effect," Response, pp. 9-10, to the Sixth Amendment in the Plaintiffs' cases.

Plaintiffs cite *Finstuen v. Crutcher*, 496 F.3d 1139, 1151 (10th Cir. 2007), for the proposition that the head of a statewide agency can be named as a defendant in a lawsuit involving the agency's duties. Response, p. 11. Fair enough. The problem in this case, however, is that the remedies sought in this suit do not involve the PDC's statutory duties. Plaintiffs are correct that "the PDC has direct, statutory duties to establish rules governing public defenders throughout the State, I.C. § 19-850(1)(a), and is mandated to make recommendations for system-wide reform, I.C. § 19-850(1)(b)." Response, p. 11. But, this is the starting point of analysis, not the ending point. The PDC has rulemaking power in only two areas: "Training and continuing legal education requirements for defending attorneys" and "Uniform data reporting requirements." § 19-850(1)(a)(i)-(ii). Its recommendatory authority is just that: recommendatory.

None of the four named Plaintiffs alleged that they were denied effective assistance of counsel because their public defenders were not properly trained or were not making uniform reports. Complaint, ¶¶ 3-7, 63-84. Further, even if their claims were amended to include inadequate training and reporting, the core of their complaints — no representation at initial appearances, high caseloads, insufficient continuing involvement in the case, no access to expert witnesses, inadequate conflict counsel, etc. — would be affected only at the margins (if at all) by training and reporting rules. The presence or absence of PDC rulemaking in the training and reporting areas has not deprived or caused any Plaintiff to be deprived of Sixth Amendment

rights to counsel along the lines of their claims. There is no injunction that the Court can issue to the PDC members regarding training or reporting that will affect these larger issues. That is further shown by the absence of enforcement power in the PDC statutes; *i.e.*, even if the PDC were to adopt rules, the PDC could not compel a county to abide by them.

As for recommendatory authority, the PDC can recommend reforms in every area mentioned in the Complaint, but the PDC cannot require the Legislature to enact its recommendations. Thus, failure to recommend is not a deprivation of Sixth Amendment rights because the causal chain (if any) is broken by the requirement for the Legislature to act. *E.g.*, *Galen v. City of Los Angeles*, 477 F.3d 652 (9th Cir. 2007) (sheriff deputies that make bail recommendations cannot be sued for denial of Eighth Amendment right to non-excessive bail because a superseding decisionmaker — a judge — sets bail). Thus, neither the PDC's rulemaking nor its recommendatory authority allows it to address the core Sixth Amendment issues that are the subject of the Complaint. Its members cannot be enjoined to do what they have no power to do.

Response page 13 returns to the training and reporting themes, but does not explain how the PDC's training programs (which presumably help with delivery of public defense services) deprive a Plaintiff of Sixth Amendment rights. Nor does the Response explain how rulemaking authority over training and reporting give the PDC a legal responsibility for "overseeing indigent defense reform in Idaho, not just at a policy level, but on a local level as well." Response, p. 13. The PDC's training and reporting authority do not bootstrap it into authority over all aspects of public defense in Idaho. While it made sense in *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1136 (W.D. Wash. 2013), Response, p. 13, to require data reporting by defendants that provide public defenders services, *Wilbur's* rationale does not require an agency with authority to require data reporting to be responsible for public defender services.

Plaintiffs say "the PDC has failed to promulgate rules and provide recommendations that would have set specific standards for the state's public defense system, and thus has contributed to the ongoing failure of the system." Response, p. 14. Plaintiffs may offer that opinion as a matter of political judgment, but this is a Court, not a debating society; the issue is not whether

the PDC has "contributed" to the problem in some vague manner, but whether an injunction regarding the PDC's statutory powers will remedy the problems that the Complaint describes. They will not. No remedial injunction regarding PDC rules or recommendations will give the Plaintiffs redress. The Federal claims against the PDC members should be dismissed.

## III. THE STATE LAW CLAIMS AGAINST IDAHO SHOULD BE DISMISSED ON SOVEREIGN IMMUNITY, PRUDENTIAL, AND/OR SEPARATION-OF-POWERS GROUNDS; THE STATE LAW CLAIMS AGAINST THE GOVERNOR AND THE PDC MEMBERS SHOULD BE DISMISSED FOR THE SAME REASONS AS THE FEDERAL CLAIMS

The section first addresses the State law claims against Idaho itself and explains why they should be rejected. It then adopts by reference its argument in the Federal claims against the Governor and the PDC members with some additional comments.

### A. The State Law Claims Against the State Should Be Dismissed

#### *1. The State Is Entitled to Sovereign Immunity from Suit*

"States entered the Union with their sovereign immunity intact." *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 253, 131 S. Ct. 1632, 1637 (2011). Idaho retains its sovereign immunity unless the Legislature waives it by statute. *Sanchez v. State, Dep't of Correction*, 143 Idaho 239, 244-45, 141 P.3d 1108, 1113-14 (2006). Thus, the threshold issue in a suit against the State is: Has statute waived sovereign immunity?

Plaintiffs cite *ISSEO II* and *ISEEO V*[10] in support of their contention that the State may be sued for systemic constitutional violations. Response, p. 3, n.2 ("the State itself remains a proper defendant to the Plaintiffs' state law claims"); p. 19 ("Idaho courts are no strangers to this kind of systemic reform litigation"); p. 21 ("just as in other systemic reform litigation in Idaho state courts, the ultimate question ... is not whether implementation in individual local jurisdictions is adequate, but whether the State has provided an adequate means for local jurisdictions to provide

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[10] *ISEEO II* is *Idaho Schools for Equal Educational Opportunity v. Idaho State Board of Education*, 128 Idaho 276, 912 P.2d 644 (1996). *ISEEO V* is *Idaho Schools for Equal Educational Opportunity v State*, 142 Idaho 450, 129 P.2d 1199 (2005). *ISEEO I*, which is also discussed in this Reply, is *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 570, 850 P.2d 724 (1993).

constitutionally sufficient services"); p. 23 ("In systemic reform class litigation, ... the Idaho Supreme Court has recognized a public interest justiciability exception to ensure these kinds of cases are heard").

Plaintiffs overstate the *ISEEO* cases. The *ISEEO* plaintiffs did not have a State constitutional right to bring a claim that there was a systemic failure of "the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." Article IX, § 1. When the *ISEEO* defendants questioned school districts' authority to sue the State, *ISEEO I* held that the Legislature had consented to suit by statute. 123 Idaho at 585, 850 P.2d at 739. When the Legislature later enacted the Constitutionally Based Educational Claims Act, Idaho Code §§ 6-2201 *et seq.*, which withdrew that consent and prohibited suit for statewide systemic violations of Article IX, § 1, while preserving rights of action for claims involving a school district, Idaho Code §§ 6-2202, 6-2205, and 6-2213, the Idaho Supreme Court upheld that Act's constitutionality. *Osmunson v. State*, 135 Idaho 292, 17 P.3d 236 (2000). Thus, there is no Idaho constitutional right to sue the State over a claimed systemic failure in the public schools under Article IX, § 1; likewise, there should be no Idaho constitutional right to sue the State over a claimed systemic failure of public defense services in the counties. The State is entitled to sovereign immunity from suit.

***2. Prudential Considerations Argue Against Allowing this Lawsuit to Proceed***

*Hurrell-Harring* and *Duncan*, discussed at pp. 6-7, *supra*, do not counsel for this Court to plunge headlong into a "systemic," Statewide litigation. Both cases involved public defender services in a small number of counties. This case is much larger in scope, and the Court should proceed cautiously. One reason to be cautious is that Plaintiffs do not expound their assertions that (1) "litigating these important issues on a county- or city-level[11] ... would be inefficient, duplicative, expensive, and time-consuming" because (2) "Plaintiffs have specifically tailored the relief they are requesting to avoid imposing an unreasonable burden on either the State or the

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[11] Defendants are unsure what Plaintiffs refer to here. Cities provide public defender services in Washington, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013); they do not in Idaho. If this remark comes from a generic "canned brief," it does not make sense in Idaho.

Court" and (3) "the State has in place both the people and programs that would allow it to assign and complete that work quickly." Response, p. 21. On the contrary, (1) there would be no way to assure Statewide relief were in place unless every county's public defender services were examined; (2) the relief requested is a shotgun request to "fix everything" and has not been tailored to specifics;[12] and (3) the State does not know what people and programs are in place that would allow it to assign and complete the work quickly.

On the last point, if Plaintiffs believe the PDC has the people and programs to assign and complete the work quickly, that is incorrect. The PDC is a part-time Commission that meets at least quarterly. Idaho Code § 19-850(1)(c). Its members include one Senator, one Representative, a former District Judge (now a member of the Court of Appeals) appointed by the Chief Justice, and representatives of the Appellate Public Defender, the counties, the criminal defense bar, and the Juvenile Justice Commission. § 19-849(1)(a)-(c). The load that Plaintiffs would put on the part-time PDC members would be enormous.

There is another reason to be cautious. Plaintiffs make no secret of their goal to bring criminal prosecutions of all indigent defendants to a halt until the system is completely "fixed".

> This Court's declaration that Idaho's system is currently operating below constitutional thresholds would have a direct effect on the plaintiff class because it would ***require the State to meet those***

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12 Prayers B-F, Complaint, p. 53, ask for the following:

B) Declare that the State of Idaho is obligated to provide constitutionally adequate representation to indigent criminal defendants, including at their initial appearances;

C) Declare that the constitutional rights of Idaho's indigent criminal defendants are being violated by the State on an ongoing basis, and provide a deadline for the State to move this Court for approval of specific modifications to the structure and operation of the State's indigent-defense system;

D) Enjoin the State from continuing to violate the rights of indigent defendants by providing constitutionally deficient representation;

E) Enter an injunction requiring the State to propose, for this Court's approval and monitoring, a plan to develop and implement a statewide system of public defense that is consistent with the U.S. Constitution and the Constitution and laws of the State of Idaho;

F) Enter an injunction that requires the State to propose, for this Court's approval and monitoring, uniform workload, performance, and training standards for attorneys representing indigent criminal defendants in the State of Idaho in order to ensure accountability and to monitor effectiveness;

> ***thresholds before it could continue to prosecute indigent criminal defendants. Class members could obtain immediate further relief*** based on the judgment, ***through stays and other appropriate temporary relief*** in their criminal proceedings ***until the State dispatched the resources and rules needed for constitutional compliance.***

Response, p. 23 (emphasis added). In other words, this Court would enter an injunction and a judgment in effect requiring every indigent defendant's criminal proceedings in every State court in Idaho to be halted "until the State dispatche[s] the resources and rules needed for constitutional compliance." Does that sound like work that can be assigned and completed quickly? Nothing like that happened in *Hurrell-Harring* or *Duncan*. But that is Plaintiffs' goal here.

Plaintiffs are asking this Court to embark upon a path affecting criminal prosecutions in every county and every judicial district in Idaho — a path that neither the United States Supreme Court nor Idaho Supreme Court has required. If ever there is a case in which such a claim should be denied or dismissed until the appellate courts have had an opportunity to weigh in on the issue, this is it. Further, given that the Defendants cannot provide the relief requested because that relief can come only from the Legislature, the Court may exercise its discretion under Idaho Code § 10-1206 and "refuse to render or enter a declaratory judgment or decree" that "would not terminate the uncertainty or controversy giving rise to the proceeding."

### *3. Separation of Powers Prevents the Court from Granting the Requested Remedies*

Plaintiffs dismiss Defendants' position that the proper defendants are not before the Court by arguing that the State "should not be permitted to prevail on technical points about the scope and duties of certain State-level employees, in an effort to obscure its fundamental obligations to indigent Idaho defendants." Response, p. 22.

What Plaintiffs call "technical points" are otherwise known as Federalism and Separation of Powers. With regard to Federalism, Congress has not authorized suits against States under § 1983, *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989), and suing State officers who cannot provide the relief requested is nothing more than the sham of a suit against the State. As for State Separation of Powers, this is not technical; it is a part of the

Idaho Constitution, Article II, § 1, just like Article I, § 13 is a part of the Idaho Constitution. Plaintiffs have asked for relief from Executive Officers that can only be achieved by statutory changes. See Prayers for Relief C, E and F, n.12, p. 17, *supra*. Under Article II, § 1, no Executive officer can exercise the Legislative Power, nor may he or she be enjoined to do so.

### B. Plaintiffs' State Law Claims Against the Governor and the PDC Should Also Be Dismissed

Plaintiffs' State law claims against the Governor and the PDC members should be dismissed for the reasons given for dismissing the Federal claims against the Governor, see pp. 8-13, *supra*, and against the PDC members, pp. 13-15, *supra*.

Some additional State law reasons follow. The Governor and the PDC are described as part of an "Executive Legislative System," Response, p. 14, in which the PDC wants to keep the Governor's Office in the loop regarding terms for contracts and possible rulemaking. See 2nd Eppink Aff., Ex. 8. What is the consequence of these allegations about contracts and internal rulemaking practices (none of which are in the Complaint)? Is any Plaintiff deprived of a constitutional right because the PDC cooperates with the Governor's Office on contracts and does not hide the ball on rules? The Complaint does not allege so, nor would there be any basis for such a conclusion of law if it had alleged so. Plaintiffs' State law claims against the members of the PDC are grounded in Article I, § 13, see Complaint, Second and Fourth Claims for Relief, ¶¶ 174-76 and 181-83, pp. 51-53. The PDC's relationship with the Governor's Office does not bear on Article I, § 13, and it is no reason to deny the Motion to Dismiss.[13]

## IV. CONCLUSION

Ordinarily, one concludes a Reply with a simple statement of the relief requested and ends it with that. The relief requested is dismissal of the Complaint for failure to state a claim upon which relief can be granted. I.R.C.P. 12(b)(6).

This is the unusual case where some further comment on the role of the Judiciary is in

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[13] Plaintiffs have not sought any relief under the Idaho Administrative Procedures Act (APA), Idaho Code §§ 67-5201 *et seq.*, so this Reply does not express any opinion regarding the PDC and the APA.

order. Plaintiffs contend that it is the Court's "fundamental role to interpret and vindicate core constitutional rights, to render judgment on the statewide system," Response, p. 2, and that the question before the Court "is whether a declaratory judgment action may proceed at all. To decide that question, this Court only considers whether the uncertainty about the statewide system's constitutionality presents 'a real and substantial controversy' or merely a hypothetical one," Response, p. 24 (citation omitted).

Plaintiffs are missing the point of Defendants' Motion to Dismiss. A Court's fundamental role is to issue judgments in ***cases or controversies between parties***. Before a Court can vindicate rights, it must determine that the controversy is between the parties before it, not with some other parties. "A plaintiff's failure to name the proper defendant is fatal to the claim." *Health-Now New York, Inc. v. New York*, 739 F. Supp. 2d 286, 295 (W.D.N.Y. 2010) *aff'd*, 448 F. App'x 79 (2d Cir. 2011) (citation and internal punctuation omitted) (complaint dismissed because New York Attorney General did not have enforcement power for statute that was the subject matter of the suit). Likewise, this Complaint should be dismissed for lack of a proper defendant.

No case holds, in Plaintiffs' words, that "if no State of Idaho official is tasked with fulfilling a constitutional responsibility, ... it is the judiciary's job to declare a constitutional violation." Response, pp. 6-7. No case holds that it is a constitutional requirement to create an office or appoint an officer at the State level who can be sued to implement a constitutional right.

In the end, Plaintiffs' argument is that two constitutional wrongs make a right. Their claim of constitutionally inadequate public defense services is the first constitutional "wrong" . The remedy of suing the Executive Officers to obtain Legislative remedies is the second constitutional "wrong". Together, under Plaintiffs' theories, these two constitutional "wrongs" make a constitutional "right". They do not. The Complaint should be dismissed because Plaintiffs have sued the wrong Defendants — Defendants who cannot provide the relief they seek.

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DATED this 4th day of December, 2015.

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ORIGINAL

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA**

| | |
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| TRACY TUCKER, *et al.*, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IDAHO, *et al.*,<br><br>Defendants. | **Case No. CV OC 1510240**<br><br>**DEFENDANTS' OBJECTION AND MOTION TO STRIKE**<br><br>**NOTICE OF HEARING** |

Defendants (1) the State of Idaho, (2) Governor C.L. "Butch" Otter, and (3) the seven members of the Public Defense Commission (PDC) object to and move to strike Plaintiffs' Affidavits and Exhibits filed in support of Plaintiffs' Response to Defendants' Motion to Dismiss.

**ARGUMENT**

Defendants moved to dismiss under Rule 12(b)(6) because "The Complaint Does Not

State a Claim Upon Which Relief May Be Granted" under either Federal or State law. Memorandum in Support of Motion to Dismiss, pp. 7, 11. Thus, "the court does not accept affidavits," and "the moving party has the option to test the law and reserve a right to test the facts, *i. e.*, by making a 12(b)(6) motion, reserving a Rule 56 motion." *Stewart v. Arrington Const. Co.*, 92 Idaho 526, 530, 446 P.2d 895, 899 (1968). "The only facts which a court may properly consider on a motion to dismiss for failure to state a claim are those appearing in the complaint .... ... [A] trial court in considering a 12(b)(6) motion to dismiss, has no right to hear evidence ... ." *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990), reaffirmed by *Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010) (internal punctuation and citations omitted).

Defendants stand on their right to bring a pure motion to dismiss for failure to state a claim upon which relief can be granted that is not converted into a Motion for Summary Judgment. The Court should grant this Objection and Motion to Strike and not consider any Affidavits or Exhibits filed in support of Plaintiffs' Response to Defendants' Motion to Dismiss.

**ORAL ARGUMENT — NOTICE OF HEARING**

The Court may rule on this Objection and Motion to Strike with or without oral argument. I.R.C.P. 7(b)(3)-(4). If the Court does not rule without oral argument, Defendants hereby notice argument on their Objection and Motion to Strike for the same time as argument on their Motion to Dismiss, namely, on **Wednesday, December 16, 2015 at 3:00 PM, in the Ada County Courthouse, 200 West Front Street, Boise, Idaho**, before District Judge Samuel A. Hoagland.

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DATED this 4th day of December, 2015.

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OFFICE OF THE ATTORNEY GENERAL.

By _____
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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, *et al.*,

Plaintiffs,

vs.

STATE OF IDAHO, *et al.*,

Defendants.

Case No. CV OC 1510240

**PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTION AND MOTION TO STRIKE FILED DECEMBER 4, 2015**

The defendants ("State") make clear in their reply brief that the motion to dismiss challenges whether there is a "case or controversy" here. Reply Mem. in Supp. of Defs.' Mot. to Dismiss 2 (Dec. 4, 2015) [hereinafter "Reply"] ("Plaintiffs have no case or controversy with these Defendants"); *id.* at 3 (arguing that the federal claims "SHOULD BE DISMISSED FOR A LACK OF A CASE OR CONTROVERSY"), 8 (same), 13 (same), 20). A "case or controversy" challenge is a challenge to this Court's jurisdiction. *Martin v. Camas County*, 150 Idaho 508, 512 (2011); *Gemtel Corp. v. Community Redevelopment Agency of City of Los Angeles*, 23 F.3d 1542, 1544 n.1 (9th Cir. 1994); *cf. Chacon v. Sperry Corp.*, 111 Idaho 270, 275 (1986) (holding that Idaho courts interpret their "own rules adopted from the federal courts as uniformly as possible with the federal cases"). The State, indeed, expressly acknowledges that its motion to dismiss contends a lack of a "justiciable controversy" based on a "limitation upon . . . jurisdiction," in its briefing. Mem. in Supp. of Motion to Dismiss 14, 15–16 (July 8, 2015).

As explained in *Gemtel Corp.*, when a motion to dismiss challenges the existence of a case or controversy it is a motion to dismiss "for lack of jurisdiction." 23 F.3d at 1544 n.1. Such motions do not truly seek dismissal for failure to state a claim, *id.*, but instead fall under Rule 12(b)(1)—challenges to subject matter jurisdiction. *See Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 133 (2005). A court can and should review a motion to dismiss under Rule 12(b)(1) if it challenges the court's jurisdiction, even if the moving party incorrectly labels it as a Rule 12(b)(6) motion. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (holding that case or controversy challenge must be treated as brought under Rule 12(b)(1), "even if improperly identified by the moving party as brought under Rule 12(b)(6)"); *cf.* Mot. to Dismiss 1 (July 8, 2015) (making motion under "Idaho Rule of Civil Procedure 12(b)," generally).

Where such motions raise factual disputes, the Court may construe them as Rule 12(b)(1)

motions and thus "go outside the pleadings without converting the motion into one for summary judgment." *Owsley*, 141 Idaho at 133 n.1; *St. Clair*, 880 F.2d at 201 (holding that the Court may "rely on affidavits or any other evidence properly before the court" when considering a Rule 12(b)(1) motion). As the State's reply brief makes clear, its motion has raised factual disputes. *E.g.*, Reply at 4 n.4 (disputing the nature of the Criminal Justice Commission and the import of its subcommittee's recommendations), 6 & 16 (disputing whether the ACLU cases *Hurrell-Harring v. State of New York* and *Duncan v. State of Michigan* were *statewide* challenges to public defense systems, despite that only state officials were sued), 10 n.8 (disputing the significance of the Public Defense Commission's organizational chart), 10 n.9 (disputing extent of gubernatorial influence over the State Appellate Public Defender), 12 (disputing the scope of prior executive orders), 17 (disputing whether "[t]he load" that systemic reform tasks would put on the Public Defense Commission is manageable), 18 (disputing whether necessary reforms could be assigned and completed quickly).

For that matter, even were the State's motion considered under Rule 12(b)(6), the Court still may properly review public documents, like the ones the plaintiffs have submitted here.[1] *Gemtel Corp.*, 23 F.3d at 1544 n.1 ("The court properly considered various public documents . . . . This did not convert the motion to dismiss to a motion for summary judgment."); *see also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2015) (noting that even in determining Rule 12(b)(6) motions, courts "have allowed consideration of . . . matters of public record").

Ultimately, this debate is just an academic one, for the plaintiffs could simply amend

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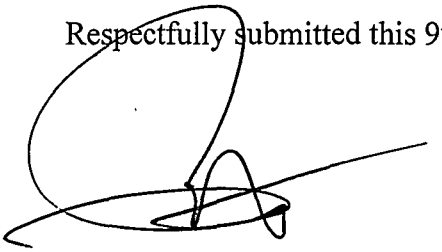
[1] Many of the documents attached to plaintiffs' response were produced by defendants to plaintiffs in response to the discovery requests that the Court ordered defendants to produce at the October 16, 2015, hearing on the motion for a protective order.

their complaint to allege all of the facts they learned through the recent Court-ordered discovery and submitted with their response brief. *See Baker v. Holder*, 475 F. App'x 156, 157 (9th Cir. 2012) (a plaintiff should be allowed to amend complaint if record, particularly attachments to an opposition, makes clear that doing so would allow her to defeat a 12(b)(1) motion); 5B Wright & Miller, *Federal Practice and Procedure* § 1350 ("Only when the affidavits show that the pleader cannot truthfully amend to allege subject matter jurisdiction should the court dismiss without leave to replead.").

In short, the Court may properly consider all of the materials in the record in deciding the State's motion. In the alternative, the Court should treat the plaintiffs' complaint as implicitly amended by the materials and testimony obtained after the Court's ruling on the motion for protective order, allowing the plaintiffs to formally amend the complaint if need be.

Respectfully submitted this 9th day of December, 2015.



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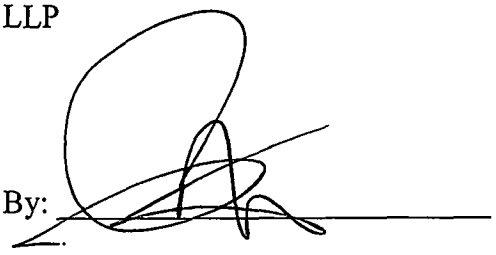
By: 

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT**

**IN AND FOR THE COUNTY OF ADA**

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| TRACY TUCKER, et al., on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IDAHO, et al.,<br><br>Defendants. | **Case No. CV OC 1510240**<br><br>**REPLY IN SUPPORT OF DEFENDANTS' OBJECTION AND MOTION TO STRIKE** |

Defendants file this Reply in Support of Defendants' Objection and Motion to Strike.

***First***, Plaintiffs argue that the Motion to Dismiss should be decided as a motion under Rule 12(b)(1) (lack of jurisdiction over the subject matter) and not under 12(b)(6) (failure to state a claim upon which relief can be granted), which entitles them to file evidence to supplement the Complaint. Response to Defendants' Objection and Motion to Strike (Response), p. 2. However,

Defendants are not challenging the Court's subject matter jurisdiction. The Memorandum in Support of Motion to Dismiss clearly states at page 6 that the Motion to Dismiss is for failure to state a claim upon relief can be granted, which is a 12(b)(6) Motion:

> For the reasons explained in the following Argument, none of these Prayers for Relief can be granted ***against any of the named Defendants***, so the Complaint should be dismissed for failure to state a claim upon which relief can be granted ***against any of the named Defendants***.

There are further references to failure to state a claim in topic headings, text, or footnotes at pp. 7-11.[1] The Conclusion on p. 19 says: "All of Plaintiffs' Federal and State law claims should be dismissed for failure to state a claim upon which relief can be granted ***against these Defendants***." The Reply Memorandum in Support of Motion to Dismiss is similar. Reply, pp. 3, 19.

One element of failure to state a claim against the Defendants sued in their official capacities is that there was nothing that Defendants could do to provide the redress requested in the Prayers for Relief. Plaintiffs focus on Defendants' references in the Reply Brief to Plaintiffs having no case or controversy with Defendants who could not provide relief to contend that the Motion to Dismiss is (at least in part) for lack of subject matter jurisdiction. Response, p. 3.

Admittedly, whether there is a case or controversy is often described as "jurisdictional" in Federal Court rather than as an element of stating a claim upon which relief can be granted. As Justice Ginsburg explained: "This case concerns the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503, 126 S. Ct. 1235, 1238 (2006). There can be similar confusion here. Defendants are not contesting this Court's subject-matter jurisdiction to hear cases under § 1983 or under Article I, § 13; they are contesting whether Plaintiffs stated a claim upon which relief can be granted

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[1] Plaintiffs seize upon a quotation from a case in Defendants' Memorandum in Support of Motion to Dismiss, pp. 15-16, to say that the "State expressly acknowledges that its motion to dismiss contends a lack of a justiciable controversy based on a limitation upon jurisdiction in its briefing." Response, p. 2 (internal punctuation omitted). The case cited spoke of jurisdiction, but the text of the argument spoke about redressability in the sense of redressability being an element that must exist in a claim. See page 16 of that Memorandum. The State made no lack-of-subject-matter-jurisdiction argument.

***against these Defendants***, *i.e.*, do Plaintiffs have a case or controversy with these Defendants in the sense of: Can these Defendants provide relief to Plaintiffs?

A simple (albeit ridiculous) example shows that failure to state a claim upon which relief can be granted and failure to allege a case or controversy with a defendant are not mutually exclusive. Assume a plaintiff petitioned the District Court to be crowned the king of Idaho. That would fail to state a claim upon which relief can be granted. See U.S. Const., Art. I, § 10, cl. 2 ("No State shall ... grant any Title of Nobility"). No matter what State officer the plaintiff sued, the plaintiff would have no case or controversy with that officer, who would have no authority to crown him king. But the District Court would have general subject matter jurisdiction to decide whether a State officer may grant a title of nobility.

When the Reply Brief referred to the absence of a case or controversy with Defendants, it was referring to Defendants' lack of authority to provide Plaintiffs with relief, which is an part of determining whether Plaintiffs stated a claim upon which relief can be granted against these Defendants; it was not a challenge to the Court's subject matter jurisdiction under § 1983 or under Article I, § 13. However, if the Court believes that the Motion to Dismiss presents 12(b)(1) issues of subject matter jurisdiction, Defendants have a simple solution: They withdraw any 12(b)(1) issues and present a 12(b)(6) Motion.

***Second***, Defendants disagree with Plaintiff s' assertion that "As the State's reply brief makes clear, its motion has raised factual disputes." Response, p. 3. When Defendants filed the Reply, they were on the horns of a dilemma. Plaintiffs had filed Affidavits and Exhibits with facts that were not in their Complaint with their Response to the Motion to Dismiss. Defendants objected and moved to strike, but still had to address the Affidavits and Exhibits:

> Defendants cannot know before their argument whether their Objection and Motion to Strike will be granted. Thus, this Reply addresses the Affidavits and Exhibits as a fallback argument in case the Objection and Motion to Strike is denied in full or in part, but Defendants' primary argument is that the Affidavits and Exhibits should not be considered at all.

Reply Memorandum in Support of Motion to Dismiss, pp. 1-2.

The Reply in Support of the Motion to Dismiss did not concede there were factual issues. It recognized that Plaintiffs attempted to introduce extra-Complaint facts and dealt with that attempt as best it could: Defendants (1) objected and moved to strike as their primary positon, but (2) discussed the facts as their fallback if their Objection/Motion were denied.

***Third***, some things that Plaintiffs describe as "factual" issues are not factual issues at all. The Complaint seeks statewide relief regarding public defender services. Prayer for Relief ("develop and implement a statewide system of public defense"). Defendants pointed out that two cases cited by Plaintiffs — *Hurrell-Harring* and *Duncan*[2] — did not involve statewide relief, but relief specific to a small number of counties. Plaintiffs do not explain how a factual difference between the relief in *Hurrell-Harring* and *Duncan* and the relief sought here creates a factual dispute between Plaintiffs and Defendants. There is no factual dispute between Plaintiffs and Defendants; both agree that Plaintiffs seek statewide relief.

***Fourth***, Plaintiffs are attempting to turn issues of law — *e.g.*, what is the Governor's constitutional or statutory authority or the Public Defense Commission's statutory authority[3] — into issues of fact that the Court must resolve. They say that they could simply amend their Complaint to add the necessary allegations that are in their Affidavits and Exhibits, so the Court should consider their Affidavits and Exhibits in deciding the Motion to Dismiss. Response, pp. 3-4. However, the Court is not bound by conclusions of law in a Complaint. *Owsley v. Idaho Industrial Comm'n*, 141 Idaho 129, 136, 106 P.3d 455, 462 (2005). Defendants' Motion to Dismiss presents legal issues including whether the Defendants have the constitutional or statutory power to exercise the authority that the Prayers for Relief would have the Court order them to

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2 Cites to these cases in various appellate courts are found in Defendants' Reply in Support of Motion to Dismiss at pp. 6-7.

3 Although the issue of law of whether the Governor has direct authority to tell the Public Defense Commission what to do is irrelevant to the issue of the Governor's and/or the Commission's authority or lack of authority to grant the relief requested, Plaintiffs sought to establish the Governor's "authority" over the Public Defense Commission through a chart prepared by Commission staff. 2nd Eppink Aff., Ex. 13. It is Defendants' position that lines of authority are created by the Constitution or by statute and that determination of lines of authority is purely an issue of law. Courts, not bureaucrat's charts, determine who has what legal authority. Otherwise, any subordinate officer could expand or contract his/her authority at will by the simple expedient of making a chart or signing an affidavit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of December, 2015, I caused to be served a true and correct copy of the foregoing by the following method to:

| | |
|---|---|
| Richard Eppink<br>American Civil Liberties Union of Idaho Foundation<br>P.O. Box 1897<br>Boise, ID 83701 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 208-344-7201<br>☒ Email: reppink@acluidaho.org |
| Jason D. Williamson<br>American Civil Liberties Union Foundation<br>125 Broad St.<br>New York, NY 10004 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 212-549-2654<br>☒ Email: jwilliamson@aclu.org |
| Andrew C. Lillie<br>Hogan Lovells US LLP<br>One Tabor Center, Suite 1500<br>1200 Seventeenth Street<br>Denver, CO 80202 | ☐ U.S. Mail<br>☐ Hand Delivery<br>☐ Facsimile: 303-899-7333<br>☒ Email: andrew.lillie@hoganlovells.com |
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MICHAEL S. GILMORE
Deputy Attorney General

exercise. That is a "straight up" issue of law for the Court to decide, and no tome of Affidavits and Exhibits will change an issue of law into a contested issue of fact.

Thus, for the reasons given in the Objection and Motion to Strike and in this Reply, the Court should grant Defendants' Objection and Motion to Strike, decline to consider the Affidavits and Exhibits filed in opposition to the Motion to Dismiss, and decide the Motion to Dismiss solely upon the basis of the factual allegations contained in the Complaint without any factual supplementation.

DATED this 14th day of December, 2015.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
MICHAEL S. GILMORE
Deputy Attorney General
Attorney for Defendants State of Idaho, Hon. Molly Huskey, Darrel G. Bolz, Kimber Ricks, Sen. Chuck Winder, and Rep. Christy Perry

OFFICE OF THE GOVERNOR

By _____
CALLY YOUNGER
Attorney for Defendant Governor Otter

CANTRILL SKINNER WEIS CASEY & SORENSEN, LLP

By _____
DANIEL J. SKINNER
Attorney for Defendants William H. Wellman and Sara B. Thomas

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | |
|---|---|
| TRACY TUCKER, *et al.*,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF IDAHO, *et al.*,<br><br>Defendants. | Case No. CV-OC-2015-10240<br><br>MEMORANDUM DECISION AND ORDER GRANTING MOTION TO DISMISS |

THIS MATTER comes before the Court on Defendants' Motion to Dismiss, filed July 8, 2015. A hearing was held on December 10, 2015, wherein the Court took the matter under advisement. For the reasons stated herein, Defendants' Motion is GRANTED.

## BACKGROUND

The central claim in this case is that the named Plaintiffs, and other indigent criminal defendants similarly situated in the State of Idaho, are continuously being deprived of their state and federal constitutional rights to counsel and Due Process of law, by the named Defendants, who are the State of Idaho, Governor C.L. "Butch" Otter, and the Idaho Public Defense Commission. Plaintiffs seek class action certification[1] and remedial measures by this Court.

[1] Plaintiffs filed a Motion for Class Certification on June 17, 2015, which the parties agreed need not be decided until Defendants' present Motion to Dismiss was resolved.

Plaintiffs' Complaint alleges that Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne (collectively, "Plaintiffs") were arrested and prosecuted, respectively, in Bonner, Shoshone, Ada, and Payette Counties. Plaintiffs were represented by public defenders in their individual cases. They allege facts to support claims of ineffective assistance of counsel for lack of representation at initial appearances, and attorneys' failure to communicate with them at times, or to file certain motions on their behalf, or to properly investigate their cases.

Plaintiffs contend that their individual experiences are representative of "thousands of indigent defendants across the State, who have been denied their right to effective counsel."[2] Plaintiffs further claim that the "current, patchwork public-defense arrangement in Idaho remains riddled with constitutional deficiencies and fails, at all stages of the prosecution and adjudication processes, to ensure adequate representation for indigent defendants in both criminal and juvenile proceedings in Idaho."[3]

Plaintiffs claim that the defects in the public defender system can be summarized as follows: (1) lack of representation at initial appearances, (2) extended and unnecessary pretrial detention, (3) excessive caseloads, (4) lack of sufficient investigation and expert analysis, (5) lack of sufficient access to or communication with the public defenders assigned to their cases, (6) continued use of fixed-fee contracts by some Idaho counties, (7) lack of public defender independence, and (8) lack of sufficient training, oversight, supervision, and evaluation.[4]

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[2] Pls.' Class Action Complaint for Injunctive and Declaratory Relief (hereafter, "Complaint"), ¶ 8.
[3] *Id.* ¶ 9.
[4] *Id.* ¶¶ 97-161.

In Idaho, the legislature has delegated its constitutional duty to provide public defense to the individual counties. The counties must administer and fund the public defender services. Idaho Code § 19-859 states "[t]he board of county commissioners of each county shall provide for the representation of indigent persons and other individuals who are entitled to be represented by an attorney at public expense." Counties are responsible for maintaining an office of public defender, joining with another county (or counties) to provide a joint office of public defender, contracting with an existing office of public defender, or contracting with a private defense attorney for public defender services.[5] Counties are required to "annually appropriate enough money to administer" its public defender program.[6] Some would call this an unfunded mandate.

The natural result is forty-four different systems with different standards and resources, managing thousands of cases with varying quality of services. In 2010, the National Legal Aid and Defender Association ("NLADA") issued a report after studying trial level indigent services offered in seven Idaho counties, which identified a number of specific areas of concern.[7] The report stated that "[b]y delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight, Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qualifies for services and in the level of competency of the services rendered."[8]

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[5] I.C. § 19-859.
[6] I.C. § 19-862.
[7] "These include the widespread use of fixed-fee contracts; extraordinarily high attorney caseloads and workloads; lack of consistent, effective, and confidential communication with indigent clients; inadequate, and often nonexistent, investigation of cases; lack of structural safeguards to protect the independence of defenders; lack of adequate representation of children in juvenile and criminal court; lack of sufficient supervision; lack of performance-based standards; lack of ongoing training and professional development; and lack of any meaningful funding from the State." Complaint ¶ 1.
[8] Complaint ¶ 36 (citing National Legal Aid and Defender Association, The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts: Evaluation of Trial-Level Indigent Defense Systems in Idaho at 2 (2010)).

After the NLADA report, the legislature created the Idaho Public Defense Commission ("PDC").[9] It is a self-governing executive agency with four members appointed by the Governor, two from the legislature and one from the Supreme Court. It is tasked with promulgating rules for training and education for defense attorneys and to create uniform data reporting requirements that include caseload, workload, and expenditures.[10] The PDC is also charged with making recommendations to the Idaho legislature by January 20th of each year (beginning January 20, 2015) regarding requirements for contracts between counties and private attorneys, qualifications and experience standards, enforcement mechanisms, and funding issues.[11] The PDC failed to make any recommendations as of January 20, 2015.[12]

Plaintiffs argue the PDC is too little, too late, and then it did not even do what it was supposed to do. Pointing to past public pronouncements by both the Governor and the Chief Justice, Plaintiffs claim:

> "Despite the State's acknowledgement that significant reform is necessary in this arena – by, among other things, the creation of various virtually powerless committees, including the establishment in 2010 of a public-defense subcommittee of the Criminal Justice Commission, the establishment in 2013 of a special committee of the legislature to recommend legislative reforms to the public-defense system, and the 2014 statutory amendments and formation of the PDC – the State has done little to meaningfully address the myriad problems plaguing Idaho's indigent-defense system."[13]

Plaintiffs emphasize that the State does not provide any funding or supervision to any of the counties, the public defender commission failed to promulgate any rules as of January 20, 2015,

[9] I.C. § 19-849
[10] I.C. §§ 19-849, 19-850.
[11] I.C. § 19-850.
[12] Complaint ¶ 49.
[13] Complaint ¶ 45.

and the State has failed to sufficiently address the many state and federal constitutional issues raised by the NLADA report.[14]

Unquestionably, the State is ultimately responsible for ensuring constitutionally-sound public defense. Each branch of government has its responsibility. Each branch also has its limits, due to the separation of powers. Plaintiffs allege the State has failed to provide a constitutionally-sound system of public defense, despite being on notice for over a decade of the deficiencies in the public defender system, because it provides no training, supervision, oversight, statewide standards, or funding.[15]

## COURSE OF PROCEEDINGS

On June 17, 2015, Plaintiffs filed this Class Action Complaint for Injunctive and Declaratory Relief against the State of Idaho, Governor C.L. "Butch" Otter, and seven members of the PDC (collectively, "Defendants"). Plaintiffs seek declaratory and injunctive relief to remedy the Defendants' failure "to provide effective legal representation to indigent criminal defendants across the State of Idaho, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, of Article 1, Section 13, of the Idaho Constitution, and Idaho statutes and regulations."[16]

Plaintiffs allege the following claims for relief: (1) violation of the Sixth Amendment of the United States Constitution and 42 U.S.C. § 1983 (right to counsel), (2) violation of Article 1,

[14] *Id.* ¶¶ 46-48, 52.
[15] *Id.* ¶¶ 162-169.
[16] Complaint ¶ 3.

Section 13 of the Idaho Constitution (right to counsel), (3) violation of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983 (Due Process), and (4) violation of Article 1, Section 13 (Due Process), by the Defendants' failure to ensure that all indigent criminal defendants receive meaningful and effective legal representation at all critical stages of their cases.[17]

The relief requested by Plaintiff in this case includes, in relevant part, the following:

A) Certify this case as a class action pursuant to Rule 23 of the Idaho Rules of Civil Procedure;
B) Declare that the State of Idaho is obligated to provide constitutionally adequate representation to indigent criminal defendants, including at their initial appearances;
C) Declare that the constitutional rights of Idaho's indigent criminal defendants are being violated by the State on an ongoing basis, and provide a deadline for the State to move this Court for approval of specific modifications to the structure and operation of the State's indigent-defense system;
D) Enjoin the State from continuing to violate the rights of indigent defendants by providing constitutionally deficient representation;
E) Enter an injunction requiring the State to propose, for this Court's approval and monitoring, a plan to develop and implement a statewide system of public defense that is consistent with the U.S. Constitution and the Constitution and laws of the State of Idaho;
F) Enter an injunction that requires the State to propose, for this Court's approval and monitoring, uniform workload, performance, and training standards for attorneys representing indigent criminal defendants in the State of Idaho in order to ensure accountability and to monitor effectiveness;
G) Enter an injunction barring the use of fixed-fee contracts in the delivery of indigent-defense services in the State of Idaho; . . . .[18]

On July 8, 2015, Defendants filed a Motion to Dismiss along with a Memorandum in Support. On November 23, 2015, Plaintiffs filed a Response to the Motion to Dismiss, along with an

[17] *Id.* ¶¶ 170-183.
[18] Complaint, p. 53.

Affidavit of Ian Thompson and Second Affidavit of Richard Eppink.[19] On December 4, 2015, Defendants filed a Reply Memorandum in Support of the Motion to Dismiss, along with an Objection and Motion to Strike. Plaintiffs filed a Response to Defendants' Objection and Motion to Strike on December 9, 2015.

Defendants assert that the Complaint should be dismissed because the named Defendants are not proper parties (i.e. the State of Idaho is not a "person" subject to suit under 42 U.S.C. § 1983; Governor Otter and members of the Public Defense Commission cannot be sued under § 1983 or for alleged violations of constitutional rights as they have no legal authority to make the sweeping changes to Idaho's public defense system; and the Complaint fails to state a claim for relief because the Court lacks authority to enjoin the State and there is no justiciable controversy between the State and Plaintiffs).

Plaintiffs assert that the named Defendants are the proper parties because (1) the State bears the ultimate responsibility for ensuring that the constitutional rights of Idahoans are protected (the United States Supreme Court has repeatedly indicated that indigent defense is the State's responsibility, the State has an affirmative duty to ensure Sixth Amendment compliance, the State's delegation of duties to the counties does not abdicate the State's responsibility); (2) the Governor and the PDC members are proper defendants because they are the only State officials who give effect to Idaho's statewide indigent defense system; (3) resolving systematic reform litigation is a central responsibility of the judiciary; and (4) Plaintiffs' suit complies with Idaho Rules of Civil Procedure 3(b) and 65(d).

[19] On November 24, 2015, Plaintiffs filed an "Errata" regarding certain errors in their Response, along with a Corrected Response.

## LEGAL STANDARD

"A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992). In ruling on a motion to dismiss, the issue "is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Losser v. Bradstreet*, 145 Idaho 670, 673, 183 P.3d 758, 761 (2008). "A motion to dismiss must be resolved solely from the pleadings and all facts and inferences from the record are viewed in favor of the non-moving party." *Taylor v. McNichols*, 149 Idaho 826, 832-33, 243 P.3d 642, 648-49 (2010).

To state a claim for relief and survive a Rule 12(b)(6) motion, the pleading "does not need detailed factual allegations," however, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 1959 (2007). Mere "labels and conclusions" or a "formulaic recitation of a cause of action's elements will not do." *Id.* There must be "enough facts to state a claim to relief that is plausible on its face." *Id.* at 547, 127 S. Ct. at 1960. Stated differently, "[the] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). "As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief." *Harper*, 122 Idaho at 536, 835 P.2d at 1347.

## ANALYSIS

### (1) Defendants' Objection and Motion to Strike

Along with their Response to Defendants' Motion to Dismiss, Plaintiffs filed an Affidavit of Ian Thomson and an Affidavit of Richard Eppink. Defendants contend that the Affidavits should be stricken or disregarded, because this is purely a Rule 12(b)(6) Motion and the Court has no right to consider outside material.

Plaintiffs contend that the evidence may properly be considered without converting the Motion to Dismiss into a Motion for Summary Judgment, because Defendants' Motion is really a Rule 12(b)(1) Motion challenging the Court's subject matter jurisdiction.

The Court may consider outside evidence on a Rule 12(b)(6) Motion so long as the Court converts the Motion into one for Summary Judgment. However, it is within the Court's discretion to exclude such evidence and treat the Motion as purely a Motion to Dismiss. *See Orthman v. Idaho Power Company*, 126 Idaho 960, 895 P.2d 561 (1995).

Here, the Motion to Dismiss asserts that Plaintiffs have failed to state a claim upon which relief can be granted under federal law (42 U.S.C. 1983) and under state law (Idaho Rules of Civil Procedure 3(b) and 65(d), and the Idaho Constitution). This Motion is subject to Rule 12(b)(6) and can be decided without considering outside evidence. Therefore, in exercising the Court's discretion, Defendants' Motion to Strike is GRANTED and the Affidavits filed by Plaintiffs will not be considered.

**(2) Defendants' Motion to Dismiss**

Plaintiffs have alleged that indigent criminal defendants in Idaho are systematically being deprived of their constitutional rights to counsel and Due Process of law, due to the Defendants' failure to provide an adequate public defense system in the State of Idaho.

Defendants assert that the entire action should be dismissed because the State of Idaho, the Governor and the PDC are entitled to governmental immunity, and the Court lacks authority and jurisdiction to order relief.

Before addressing the competing arguments on the Motion to Dismiss, underlying constitutional principles must first be addressed.

One of the founding principles of our system of justice is that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The landmark 1963 case, *Gideon v. Wainwright*, made clear that an indigent criminal defendant is entitled to be represented by counsel even though they lack the financial means to hire one. The Court reasoned that the state has the obligation to provide indigent defendants with counsel:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and

> present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

*Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 796-97 (1963). The Sixth Amendment right to counsel is applicable to the states under the Due Process Clause of the Fourteenth Amendment. *Id.* The Idaho Constitution also guarantees the right to counsel: "[i]n all criminal prosecutions, the party accused shall have the right to . . . appear and defend in person and with counsel." Idaho Const. art. I, § 13.

The United States Supreme Court also held that the constitutional right to counsel includes the right to *effective assistance* of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685, 104 S. Ct. at 2063. As explained in *United States v. Cronic*:

> The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal

> compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."
> . . .
>
> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself."

*United States v. Cronic*, 466 U.S. 648, 654-56, 104 S. Ct. 2039, 2044-45 (1984) (footnotes omitted, citations omitted).

"The Sixth Amendment guarantees a criminal defendant the right to counsel during all 'critical stages' of the adversarial proceedings against him." *Estrada v. State*, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006); *United States v. Wade*, 388 U.S. 218, 224, 87 S. Ct. 1926, 1931 (1967). "The commencement of the criminal prosecution, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment, marks the 'critical stage' of the prosecution to which the guarantees of the Sixth Amendment are applicable." *State v. Shelton*, 129 Idaho 877, 880-81, 934 P.2d 943, 946-47 (Ct. App. 1997). "Thus, under criminal procedures followed in Idaho, a defendant's Sixth Amendment right to counsel is triggered by the filing of a criminal complaint or an indictment." *State v. Tapp*, 136 Idaho 354, 363, 33 P.3d 828, 837 (Ct. App. 2001). A critical stage of the proceedings is any stage "where certain rights may be sacrificed or lost." *Coleman v. Alabama*, 399 U.S. 1, 7, 90 S. Ct. 1999, 2002 (1970). Critical stages include, for example, the preliminary hearing, *Coleman*, 399 U.S. at 9, 90 S. Ct. at 2003, the pretrial

lineup, *id.*, the arraignment, *Murillo v. State*, 144 Idaho 449, 454, 163 P.3d 238, 243 (Ct. App. 2007); *Bell v. Cone*, 535 U.S. 685, 696, 122 S. Ct. 1843, 1851 (2002), and the entry of a plea, *State v. Creech*, 109 Idaho 592, 602, 710 P.2d 502, 512 (1985).

As explained by the United States Supreme Court in *Maine v. Moulton*:

> [T]he Court has also recognized that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." And, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." This is because, after the initiation of adversary criminal proceedings, "'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'"

*Maine v. Moulton*, 474 U.S. 159, 170, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481 (1985) (citations omitted).

It is abundantly clear in the authorities cited above that the fundamental right to counsel, and the right to *effective* assistance of counsel, is critical not only at a defendant's trial, but also in the pretrial proceedings.

## A. GOVERNMENTAL IMMUNITY UNDER § 1983

Defendants argue that they are not the proper parties to be sued in this suit, because they are not "persons" subject to suit under 42 U.S.C. § 1983 and they cannot provide redress for the claims made by Plaintiffs. Defendants argue that there is no authority requiring a state or one of its officers "to be responsible for ensuring that there are constitutionally adequate public defender services throughout the State."[20] Defendants also contend they are not proper parties because Idaho statutes place responsibility for the public defender system on county officials, not on the Governor or the PDC.

Plaintiffs have conceded in their Response brief[21] and at oral argument that the State of Idaho is not a "person" for purposes of injunctive relief under 42 U.S.C. § 1983. Plaintiffs conceded that the federal law claims against the State should be dismissed.[22] Therefore, Counts 1 and 3 must be dismissed against the State of Idaho. Accordingly, the Court will address only whether the Governor and the PDC members are "persons" subject to suit under § 1983.

42 U.S.C. § 1983 is a remedial statute which provides an avenue of redress to persons injured by the actions of government which violated federal constitutional rights. The statue provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

[20] Defs.' Reply Mem. in Supp. of Defs.' Mot. to Dismiss, p. 4.
[21] *See* Pls.' Response to Defs.' Mot. to Dismiss, p. 3, FN 2
[22] *See* Hearing held on December 16, 2015.

> action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .[23]

In *Will v. Michigan Department of State Police*, the United States Supreme Court specifically addressed the issue of whether a State, or an official acting in his or her official capacity, is a person within the meaning of § 1983. The Court held that "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes" are not 'persons' under § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70, 109 S. Ct. 2304, 2312 (1989). *Will* also held that state officials acting in their official capacities are not "persons" within the meaning of § 1983. *Will*, 491 U.S. at 71, 109 S. Ct. at 2312.

However, there is an exception that "[w]hen sued for *prospective injunctive relief*, a state official in his official capacity is considered a "person" for § 1983 purposes. In what has become known as part of the *Ex parte Young* doctrine, a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity." *Doe*, 131 F.3d at 839 (emphasis in original, citation omitted). "The rule of *Ex parte Young* gives life to the Supremacy Clause by providing a pathway to relief from continuing violations of federal law by a state or its officers." *Los Angeles Cty. Bar Ass'n*, 979 F.2d at 704.

Under *Ex parte Young*, the state officer sued must have some connection with the enforcement of the allegedly unconstitutional act. *Ex parte Young*, 209 U.S. 123, 157, 28 S. Ct. 441, 453 (1908). "That connection must be fairly direct; a generalized duty to enforce state law or general

[23] Claims under § 1983 are limited by the scope of the Eleventh Amendment, *Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir. 1997), however, the Eleventh Amendment does not apply in state courts, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64, 109 S. Ct. 2304, 2308 (1989).

supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (citations omitted).

Defendants claim the Governor and PDC only have a "generalized duty" to supervise or enforce a constitutionally sound public defense system, but no direct or specific authority or responsibility. Defendants emphasize that the legislature has delegated that duty to the counties, as well as the duty to collect taxes in support thereof. Defendants assert that the Governor and the PDC members "do not directly control, regulate, administer, or otherwise bear responsibility for provision of public defender services, and they have no ability to provide the requested relief."[24]

Defendants point to *Association des Eleveurs de Canards et d'Oies du Quebec*, a case where producers and sellers of foie gras brought an action against the State of California, the governor, and the attorney general, to enjoin the enforcement of a statute that "bans the sale of products that are the result of force feeding birds to enlarge their livers beyond normal size." *Ass'n des Eleveurs de Canards et d'Oies du Quebec*, 729 F.3d at 942. The Ninth Circuit Court of Appeals found that the California Governor was entitled to Eleventh Amendment immunity because his only connection to the statute was a general duty to enforce state law. *Id.* at 943. However, the attorney general was not entitled to immunity, because the statute specifically authorized enforcement by district and city attorneys and the attorney general has direct supervision and the same powers as district attorneys. *Id.*

[24] Defs.' Mem. in Supp. of Mot. to Dismiss, p. 11.

Plaintiffs assert that the Governor and the PDC members have a sufficient connection to public defense in Idaho. Plaintiffs further contend that the Governor is responsible for indigent defense and has power to effectuate necessary changes to improve the public defense system. Plaintiffs assert the Governor appoints the majority of the PDC members, is deeply and directly involved in its work, and has been in regular communication with the PDC on systemic public defense issues. Plaintiffs argue that the Governor has legal appointment authority over the PDC, the State Appellate Public Defender, and boards of county commissioners as well.[25] The PDC has statutory duties to establish rules governing public defenders throughout the State, I.C. § 19-850(1)(a), and is mandated to make recommendations for system-wide reform, I.C. § 19-850(1)(b).[26]

Plaintiffs cite *Los Angeles County Bar Association*, where the Ninth Circuit Court of Appeals found that the governor was not entitled to Eleventh Amendment immunity where the bar association was challenging the constitutionality of a statute that prescribed the number of judges on the Superior Court of Los Angeles County. *Los Angeles Cty. Bar Ass'n*, 979 F.2d at 704. There, the Court found that the governor had a specific connection to the challenged statute, because the governor had the duty to appoint judges to any new positions. *Id.*

Defendants urge the Court to find that the Governor and the PDC have no responsibility for public defense in Idaho. The Court disagrees. Contrary to the alleged animal abuse issue presented in *Association des Eleveurs de Canards et d'Oies du Quebec*, the central issue in this case concerns the continuous and systematic violation of fundamental constitutional human

[25] Pls.' Response to Defs.' Mot. to Dismiss, p. 11.
[26] *Id.*

rights. Plaintiffs pose serious allegations of widespread systemic violations of constitutional rights to counsel, to effective assistance of counsel, and to fair judicial proceedings for indigent criminal defendants across the State of Idaho.

The Defendants would have the Court believe that the plain language set forth in United States Supreme Court cases mandating that it is the State's responsibility to provide counsel to indigent criminal defendants does not in fact place any responsibility on the Defendants in this case.

Under the *Ex parte Young* doctrine, the Court finds that the Governor and the PDC members have a more than sufficiently close connection or nexus to the enforcement of public defense in Idaho. The Governor has a duty to ensure that the Constitution and laws are enforced in Idaho. The Governor also has direct supervisory authority over those responsible to establish standards for a constitutionally sound public defense system. The PDC was specifically saddled with the responsibility of creating rules regarding training and education of defense attorneys and making recommendations to the legislature for improving public defense in Idaho. The fact that the legislature has delegated public defender services to individual counties does not abdicate the Defendants' responsibility to indigent criminal defendants in the State of Idaho. (Neither does it abdicate further legislative responsibility, nor excuse legislative inaction.)

Accordingly, the Court finds that the Governor and the PDC members are subject to suit under 42 U.S.C. § 1983.

## B. JUSTICIABLE CONTROVERSY

In this case, Plaintiffs seek various forms of declaratory and injunctive relief. "A prerequisite to a declaratory judgment action is an actual or justiciable controversy." *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989). The elements of a justiciable controversy include the following:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

*Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 31, 253 P.3d 700, 705 (2011) (citation omitted). "Justiciability is generally divided into subcategories—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions." *Miles*, 116 Idaho at 639, 778 P.2d at 761.

In this case, the issues of standing, ripeness, and separation of powers are implicated.[27] Each issue will be discussed in turn.

[27] In *Miles v. Idaho Power Company*, the Court discussed separation of powers as an element of justiciability. *Miles*, 116 Idaho at 639, 778 P.2d at 761 (1989). Accordingly, separation of powers will be addressed as a sub-issue of the justiciability doctrine.

## 1) Standing

Plaintiffs must first establish standing to bring a case. "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles*, 116 Idaho at 641, 778 P.2d at 763. The major aspect of the standing inquiry has been explained as follows:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct.

*Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 72, 98 S. Ct. 2620, 2630 (1978) (citations omitted). Thus, in order to have standing to bring suit, a plaintiff must have (1) suffered an injury in fact, (2) causally connected to the conduct complained of, and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

"[T]o satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Miles*, 116 Idaho at 641, 778 P.2d at 763. "In some cases even though a plaintiff has shown or alleged an 'injury in fact,' standing is denied because of other factors. For example, the United States Supreme Court has held that 'when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of

citizens, that harm alone normally does not warrant exercise of jurisdiction.'" *Id.* (citation omitted).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2137 (citation omitted).

*a. Injury in Fact*

This is an issue of first impression in Idaho, as neither the United States Supreme Court nor the Idaho Supreme Court has addressed a Sixth Amendment right to the effective assistance of counsel claim for declaratory and prospective injunctive relief concerning claimed pre-conviction systemic injuries resulting from the representation that indigent criminal defendants are receiving from their publically appointed attorneys.

In this case, Plaintiffs' alleged injury is the violation of their right to effective assistance of counsel. As alleged, the injury is specialized and peculiar to each of the named Plaintiffs. However, Plaintiffs also allege that *all* indigent criminal defendants are suffering alike from the current public defender system in Idaho.

Here, it is important to note the procedural posture of the Plaintiffs' underlying criminal lawsuits in this matter. As of the date the lawsuit was filed, none of the Plaintiffs were convicted or

sentenced in any of their pending criminal cases. On the record presented, it is troubling to the Court that the Plaintiffs have not yet been convicted of any crime in their underlying cases, nor pursued or exhausted any appeal rights, nor any post-conviction relief. Accordingly, the Court fails to see how the Plaintiffs have suffered an injury at the time the Complaint was filed in this matter. At this point, Plaintiffs have alleged various forms of ineffective assistance of counsel; however, there is not yet any ascertainable injury – i.e. none of the Plaintiffs have either been convicted or sentenced. Accordingly, the Court finds the Plaintiffs have not properly alleged an actual injury.

*b. Causal Connection*

The second element of standing requires the Plaintiffs to properly allege that the injury suffered is causally connected to the conduct complained of. In other words, the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136.

Plaintiffs allege that the State, the Governor, and the PDC are ultimately on the hook for public defender services in Idaho. However, the legislature has currently delegated the responsibility for public defender services to individual counties, none of which are parties to this suit. The Complaint alleges, and it is commonly accepted in official pronouncements by the highest officials in all three branches of government that there are widespread systemic problems with the public defense system. Defendants concede this point. However, it is not clear (or even properly alleged) that systemic constitutional violations are occurring in every county. Plaintiffs

allege there is a problem with public defense in the entire State of Idaho, but only provides examples from a sampling of counties that are not even party to this lawsuit.

Plaintiffs challenge the inaction of the Defendants, but do not acknowledge the legislature and the county commissioners – the principal bodies with the power to affect the policy (political) and systemic changes Plaintiffs seek. The connection of the claimed injury to the Governor and the PDC are too remote to be fairly traceable. Neither has the power and authority to act alone to redress Plaintiffs' grievances. Certainly, both have moral, political, and public power to pressure the legislature or the counties to act, but neither have the ability to require it. Accordingly, there is no fairly traceable causal connection between the claimed injury and the challenged inaction.

*c. Redressability*

Finally, Plaintiffs must show that it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *See Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136. In order to have standing, the Court must be able to redress the problems not merely in an advisory, hypothetical or speculative way, but concretely.

Here, Plaintiffs seek relief in their individual cases as well as in all other indigent criminal cases in Idaho. However, there is no basis for the Court to award such relief where the Plaintiffs themselves have not even been convicted of a crime, nor appealed, nor sought post-conviction or other relief.

Instead, Plaintiffs invite the Court to make a variety of largely speculative assumptions: (1) that the Plaintiffs (and the class members they would represent) will in fact be convicted of a crime, (2) that the actions or inactions of the Defendants will have caused those convictions (i.e. that the actions or inactions of Defendants will have been so prejudicial that the Plaintiffs will have been denied their constitutional right to a fair trial), (3) that the trial courts in each case will be unable or unwilling to correct such results (e.g., new trial, dismissal, etc.), (4) that the Plaintiffs will be granted the relief they seek in this case, and that any such remedy would or could truly redress the problem.

The issue of ineffective assistance of counsel is frequently raised in petitions for post-conviction relief and addressed on a case-by-case basis. In every case, before or after exhausting appeal rights, every convicted criminal defendant has the right to seek judicial review of the public defense services provided. The topic has been addressed by the United States Supreme Court and by the Idaho Supreme Court on a number of occasions.

In *Strickland v. Washington*, the United States Supreme Court laid down a two-part test to analyze claims alleging ineffective assistance of counsel. Under this test, the petitioner must demonstrate (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65 (1984). To establish deficient performance, the applicant must prove that counsel's representation fell below an objective standard of reasonableness. *Id.*

In a post-conviction setting, a criminal defendant has the right to challenge the adequacy of his or her representation, and those cases are decided on a case-by-case basis, with the Court finding the individual facts of the case based on evidence and testimony, then applying the law to the facts, which is the traditional exercise of judicial authority.[28] *Strickland* requires proof of actual prejudice, and here, there is no showing that any prejudice has been suffered in the Plaintiffs' underlying criminal cases. Rather, the prejudice suffered by Plaintiffs is merely hypothetical at this point. Moreover, even if prejudice were actually shown, any relief by this Court would be advisory or hypothetical since the underlying criminal cases are not before this Court.

Plaintiffs do not contend that the post-conviction procedure is faulty or is systematically failing criminal defendants in Idaho. Instead, Plaintiffs ask this Court to basically intervene and supersede in every single case, and in every court and county and to then make a blanket determination that every indigent criminal defendant's rights are being violated. This is a giant step from the case-by-case analysis of ineffective assistance of counsel claims. Plaintiffs generally request sweeping relief for counties and cases where there might not be any deficiency in public defense services.

Without a doubt, the Court believes that there are serious problems with public defense in Idaho that need to be addressed. However, this Court cannot and should not usurp the duties of the PDC. Essentially, the Plaintiffs request the Court to assume control of public defense in Idaho, on the basis that a few defendants might have their rights violated. Such relief is too speculative and fundamentally violates the notion that courts are to decide specific cases and controversies before them. Accordingly, the Court finds Plaintiffs lack standing.

[28] Extended even further, there is also the Writ of Habeas Corpus remedy available.

2) **Ripeness**

Another subcategory of justiciability is ripeness, which "asks whether there is any need for court action at the present time." *Miles*, 116 Idaho at 642, 778 P.2d at 764. A case is not justiciable if it is not ripe. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). "The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Noh*, 137 Idaho at 801, 53 P.3d at 1220. A declaratory judgment action must raise issues that are definite and concrete, and must involve a real and substantial controversy as opposed to an advisory opinion based upon hypothetical facts. *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984). The purpose of the ripeness requirement is to prevent courts from entangling themselves in purely abstract disagreements. *Abbot Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515 (1967).

In this case, even with the facts in the Complaint construed as true, Plaintiffs have not made sufficient allegations to sustain a Motion to Dismiss on the first two elements of ripeness, namely, that there are definite, concrete issues and a real, substantial controversy exists. The Complaint invites the Court to make speculative assumptions regarding Plaintiffs' conclusions. For example, although an arraignment is a critical proceeding requiring counsel, there is no allegation (and the Court would find it hard to believe) that every single indigent defendant is lacking counsel in every single county and at every single arraignment. As set forth above, Plaintiffs have not even pursued any appeal or post-conviction relief in their individual cases. While it seems Plaintiffs make allegations of present violations of right to counsel, the ultimate

results in their cases have not yet been determined. Our appeals process determines whether a defendant received due process on a case-by-case basis. At this time, Plaintiffs' arguments are based on assumptions that they will be convicted and that their convictions will be due to their systemic public defense inadequacies.

This case is ultimately not ripe for adjudication. As previously set forth, none of the Plaintiffs' criminal cases have concluded, no appeals have taken place, and no post-conviction relief has been sought. In each of their individual cases, Plaintiffs can assert and litigate the claim of lack of effective assistance of counsel and lack of a fair trial. If it is decided that their constitutional rights have been violated, then those courts can order a specific remedy, for example, a new trial or dismissal of the case. Thus, the nature and extent of any real or permanent injury cannot be determined at this time. Accordingly, the Court finds the case is not ripe for adjudication.

### 3) Separation of Powers[29]

As much as anything, this case involves the constitutional doctrine of separation of powers. The doctrine permeated the discussion above, and will be discussed further below.

Defendants contend that only the legislature can make the changes requested by Plaintiffs, and the legislature would not be bound by any injunction entered by the district court in this case.

[29] Defendants originally contended in their Memorandum in Support of Motion to Dismiss that although the case presented a serious separation of powers issue, the issue need not be addressed because under Idaho Rules of Civil Procedure 3(b) and 65(d) the Court does not have authority to issue an injunction in this case. However, in their Reply Memorandum and at the hearing held on December 16, 2015, Defendants did not argue for dismissal on the basis of the Idaho Rules of Civil Procedure, but on the separation of powers doctrine. The Court does not find Defendants' argument for dismissal on the basis of the Rules 3(b) and 65(d) persuasive.

Defendants further assert that neither the Governor nor the PDC members have statutory or constitutional authority to tell county officers how to operate the public defense system.

Article 2, § 1 of the Idaho Constitution provides for the separation of powers among the three branches of Idaho's government. Article 3, § 1 provides that the power to pass bills is vested in the legislature. Article 3, § 15, provides that "[n]o law shall be passed except by bill[.]" "Read together, these three constitutional provisions stand for the proposition that, of Idaho's three branches of government, only the legislature has the power to make 'law.'" *Mead v. Arnell*, 117 Idaho 660, 664, 791 P.2d 410, 414 (1990).

The separation of powers doctrine asks "whether this Court, by entertaining review of a particular matter, would be substituting its judgment for that of another coordinate branch of government, when the matter was one properly entrusted to that other branch." *Miles*, 116 Idaho at 639, 778 P.2d at 761.

In *Idaho Schools for Equal Opportunity v. State*, 123 Idaho 573, 850 P.2d 724 (1993) (*ISEEO I*), the Supreme Court determined that the plaintiffs had standing to sue the defendants (including the State and the Governor) and it also rejected the State's argument that the court was invading the legislature's authority by declaring that the present level and method of funding for Idaho's public schools is unconstitutional. The Supreme Court stated:

> [W]e decline to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government.

> Passing on the constitutionality of statutory enactments, even enactment with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1813).

*Id.* at 583, 850 P.2d at 734. There is no question that the judiciary has the power to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Accordingly, a court is "not precluded from reviewing the constitutionality of a proposed course of action merely because both the executive and legislative branches happen to concur in supporting it." *Miles*, 116 Idaho at 640, 778 P.2d at 762. "Constitutional rights, as well as this Court's duty to faithfully interpret our constitution and the federal constitution, do not wane before united efforts of the legislature and the governor." *Id.*

Here, the Idaho legislature has delegated the duty to provide indigent criminal defense to the counties. *See* I.C. § 19-859. Plaintiffs ask the Court to override this system and reshape the system of indigent criminal defense in Idaho. The Court finds that it would invade the province of the legislature to do so.

Plaintiffs do not argue that the statute delegating the duty to provide public defense is unconstitutional. They simply argue that the county commissioners in some or all of the counties, and the various systems of public defense, have failed to protect their constitutional rights to counsel and a fair trial. Instead of filing suit against those counties where they believe their constitutional rights have been violated, they brought this action against the State, the Governor, and the PDC. Plaintiffs also do not argue that the statute establishing the PDC is unconstitutional. They argue, instead, that the PDC is an ineffective and inadequate response by

the legislature to redress the problem of inadequate or ineffective assistance of public defense counsel. Instead of seeking to have an act declared unconstitutional, they ask this Court to declare the inaction to be unconstitutional. Plaintiffs ask this Court to declare the whole system (or lack of system) to be unconstitutional and to then establish standards or guidelines, based on previous holdings of other courts, that the Governor, the PDC, the legislature, and all counties (whom they have not sued at this time), must follow. Plaintiffs ask this Court to mandate that the Governor and the PDC (and the legislature and counties) must enact as legislation, ordinances, or rules to meet those standards, and to provide adequate funding therefore. This Court does not have the power or jurisdiction to do so under the established principles of separation of powers imbedded in the federal and state constitutions.

To be sure, the Governor, as the "supreme executive power of the state" has the duty to ensure that the constitution and laws are enforced. Idaho Const. art. IV, § 5. The Governor also has the ability to make recommendations to the legislature concerning the public defense system in Idaho. In addition, the Governor can veto budgets that do not appropriate any funding toward improving the public defender system in Idaho. Thus, even without the "power of the purse" or the power to legislate, the Governor has a constitutional duty to ensure a constitutionally sound public defense system, to the maximum extent of his authority within the limitations of power of the office. Moreover, the PDC has direct statutory duties and responsibilities, some of which were not met more than a year ago.

Under the long-held principles of *Marbury v. Madison*, this Court has jurisdiction to pass on the constitutionality of statutory enactments, even enactments with political overtones. This is a

fundamental responsibility of the judiciary. However, it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. Accordingly, the Court finds the case violates the separation of powers doctrine.

This case presents troubling allegations regarding problems with the public defender system in Idaho. The Court is sympathetic with Plaintiffs' plight. However, the case invites the Court to make speculative assumptions regarding the outcomes of individual cases (that are before other courts and in other counties), presume that all indigent criminal defendants in all counties are receiving the same ineffective assistance of counsel, and then issue blanket orders halting all criminal prosecutions until the issues are resolved. The Court declines to do so as such action would essentially mandate the Court legislating standards that must be met in every county and in every case. Courts can, and do, find, and redress violations of constitutional rights in individual cases. But, it is not the proper role of the Court to legislate specific standards, nor can the Court provide funding to enact those standards. Accordingly, the Court finds that this case is not a proper case or controversy for judicial action.

**CONCLUSION**

For all the reasons set forth herein, Defendants' Motion to Dismiss is GRANTED.

IT IS SO ORDERED this 20th day of ~~January~~, 2016.

SAMUEL A. HOAGLAND
District Judge

## CERTIFICATE OF MAILING

I hereby certify that on this 21 day of January, 2016, I mailed (served) a true and correct copy of the within instrument to:

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Christopher Rich
Clerk of the District Court

By Stephanie Hardy
Deputy Court Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | |
|---|---|
| TRACY TUCKER, *et al.*,<br>Plaintiffs,<br>vs.<br>STATE OF IDAHO, *et al.*,<br>Defendants. | Case No. CV-OC-2015-10240<br>JUDGMENT |

JUDGMENT IS ENTERED AS FOLLOWS:

Plaintiffs' Complaint is DISMISSED with prejudice.

IT IS SO ORDERED this 21st day of January, 2016.

SAMUEL A. HOAGLAND
District Judge

## CERTIFICATE OF MAILING

I hereby certify that on this 21st day of January, 2016, I mailed (served) a true and correct copy of the within instrument to:

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*Admitted pro hac vice*

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRACY TUCKER, JASON SHARP, NAOMI MORLEY, and JEREMY PAYNE, on behalf of themselves and all others similarly situated,

Plaintiffs- Appellants,

vs.

STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. LINDA COPPLE-TROUT, in her official capacity as a member of the Idaho State Public Defense Commission; DARRELL G. BOLZ, in his official capacity as a member of the Idaho State Public Defense Commission; SARA B. THOMAS, in her official capacity as a member of the Idaho State Public Defense Commission; WILLIAM H. WELLMAN, in his official capacity as a member of the Idaho State Public Defense Commission; KIMBER RICKS, in his official capacity as a member of the Idaho State Public Defense Commission; SEN. CHUCK

Case No. CV OC 1510240

**NOTICE OF APPEAL**

WINDER, in his official capacity as a member of the Idaho State Public Defense Commission; and REP. CHRISTY PERRY, in her official capacity as a member of the Idaho State Public Defense Commission,

Defendants-Respondents.

TO: THE ABOVE-NAMED RESPONDENTS, STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. LINDA COPPLE-TROUT, in her official capacity as a member of the Idaho State Public Defense Commission; DARRELL G. BOLZ, in his official capacity as a member of the Idaho State Public Defense Commission; SARA B. THOMAS, in her official capacity as a member of the Idaho State Public Defense Commission; WILLIAM H. WELLMAN, in his official capacity as a member of the Idaho State Public Defense Commission; KIMBER RICKS, in his official capacity as a member of the Idaho State Public Defense Commission; SEN. CHUCK WINDER, in his official capacity as a member of the Idaho State Public Defense Commission; and REP. CHRISTY PERRY, in her official capacity as a member of the Idaho State Public Defense Commission, AND THE PARTIES' ATTORNEYS, Steven L. Olsen, Michael S. Gilmore, Shasta Kilminster-Hadley, Scott Zanzig, Civil Litigation Division, Office of the Attorney General, 954 West Jefferson Street, 2nd Floor, Boise, Idaho 83702; Cally A. Younger, Counsel to the Governor, Office of the Governor, Idaho State Capitol Building, 700 West Jefferson Street, Boise, Idaho 83702; and Daniel J. Skinner, Cantrill, Skinner, Lewis, Casey & Sorensen, LLP, P.O. Box 359, Boise, Idaho 83701, AND THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellants, TRACY TUCKER, JASON SHARP, NAOMI MORLEY, and JEREMY PAYNE, on behalf of themselves and all others similarly situated, appeal against the above-named respondents to the Idaho Supreme Court from the JUDGMENT, entered January 21, 2016, the MEMORANDUM DECISION AND ORDER GRANTING MOTION TO DISMISS, entered January 20, 2016, and the ORDER GOVERNING DISCOVERY, entered October 20, 2015, Honorable Judge Samuel A. Hoagland.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) and (2), Idaho Appellate Rules ("I.A.R.").

3. A preliminary statement of the issues on appeal that the appellants intend to assert in the appeal is as follows:

**(a) Did the District Court err in granting the defendants' motion to dismiss?**

**(b) Did the District Court err in granting the defendants' objection and motion to strike?**

**(c) Did the District Court err in granting, in part, the defendants' motion for protective order staying discovery pending decision on motion to dismiss?**

Provided, this list of issues on appeal shall not prevent the appellants from asserting other issues on appeal.

4. Has an order been entered sealing all or any portion of the record? **No.**

5. (a) Is a reporter's transcript requested? **Yes.**

(b) The appellants request the preparation of the following portions of the reporter's transcript in [ ] hard copy [ ] electronic format [x] **both**:

**(i) Status Conference, 8/26/2015**

**(ii) Hearing on defendants' motion for protective order, 10/16/2015**

**(iii) Hearing on defendants' motion to dismiss, 12/16/2015**

6. The appellants request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

**(a) Affidavit of Jeremy Payne, filed 6/17/2015**

**(b) Affidavit of Naomi Morley, filed 6/17/2015**

**(c) Affidavit of Jason Sharp, filed 6/17/2015**

**(d) Affidavit of Tracy Tucker, filed 6/17/2015**

**(e) First Affidavit of Richard Eppink, filed 6/17/2015**

**(f) Motion to Dismiss, filed 7/8/2015**

**(g) Memorandum in Support of Motion to Dismiss, filed 7/8/2015**

**(h) Motion for Protective Order Staying Discovery Pending Decision on Motion to Dismiss, filed 8/21/2015**

**(i) Memorandum in Support of Motion for Protective Order, filed 8/21/2015**

**(j) Plaintiffs' Response to Defendants' Motion for Protective Order, filed 9/11/2015**

**(k) Reply Memorandum in Support of Defendants' Motion for Protective Order, filed 9/11/2015**

**(l) Order Governing Discovery, entered 10/20/2015**

**(m) Plaintiffs' Response to Defendants' Motion to Dismiss, filed 11/24/2015**

**(n) Second Affidavit of Richard Eppink, filed 11/24/2015**

**(o) Reply Memorandum in Support of Defendants' Motion to Dismiss, filed 12/4/2015**

**(p) Defendants' Objection and Motion to Strike, filed 12/4/2015**

**(q) Response to Defendants' Objection and Motion to Strike, filed 12/9/2015**

**(r) Reply in Support of Defendants' Objection and Motion to Strike, 12/14/2015**

7. The appellants request the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court. **(None.)**

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter on whom a transcript has been requested as named below at the address set out below:

Name and Address: Christy Olesek, 200 W. Front Street, Boise, Idaho 83702.

(b) That the reporter on whom transcripts have been requested has been contacted to

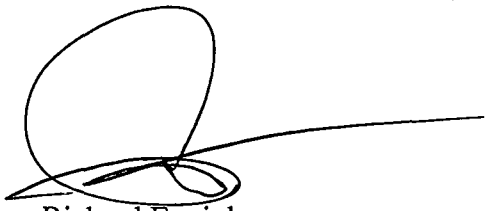
request the estimated fee for transcript preparation and that the clerk of the district court will be paid the estimated fee for preparation of the reporter's transcript promptly after the estimated fee is provided to me.

(c) That the estimated fee for preparation of the clerk's or agency's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 25th day of January, 2016.



Richard Eppink
ACLU OF IDAHO FOUNDATION

Jason D. Williamson
ACLU FOUNDATION

Andrew C. Lillie
Kathryn M. Ali
Brooks M. Hanner
HOGAN LOVELLS US LLP

*Attorneys for Plaintiffs-Appellants*

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 2016, I caused to be served a true and correct copy of the foregoing by U.S. mail, first class postage prepaid, addressed to each of the following:

Steven L. Olsen
steven.olsen@ag.idaho.gov
Michael S. Gilmore
mike.gilmore@ag.idaho.gov
Shasta Kilminster-Hadley
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Cantrill, Skinner, Lewis, Casey & Sorensen, LLP
P.O. Box 359
Boise, Idaho 83701

Christy Olesek
200 W. Front Street
Boise, Idaho 83702
*Court Reporter*

By: _____

To: Clerk of the Court
Idaho Supreme Court
451 West State Street
(208) 334-2616

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, ET AL.,
Plaintiffs-Appellants,

vs.

STATE OF IDAHO, ET AL.,
Defendants-Respondents.

Docket No. 43922

NOTICE OF TRANSCRIPT OF 113 PAGES LODGED

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada.
Honorable Samuel A. Hoagland, District Court Judge

This transcript contains:
8-26-15: Status Conference
10-16-15: Motion for Protective Order
12-16-15: Motion to Dismiss

Date: March 18, 2016

Christine Anne Olesek, RPR

Christine A. Olesek, RPR

Christine Anne Olesek, Official Court Reporter
Official Court Reporter,
Judge Samuel A. Hoagland
Idaho Certified Shorthand Reporter No. SRL-1044
Registered Professional Reporter

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY TUCKER, JASON SHARP, NAOMI MORLEY, JEREMY PAYNE, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. LINDA COPPLE TROUT, DARRELL G. BOLZ, SARA B. THOMAS, WILLIAM H. WELLMAN, KIMBER RICKS, SEN. CHUCK WINDER, and REP. CHRISTY PERRY, in their official capacities as members of the Idaho State Public Defense Commission,

Defendants-Respondents

Supreme Court Case No. 43922

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 23rd day of March, 2016.

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | |
|---|---|
| TRACY TUCKER, JASON SHARP, NAOMI MORLEY, JEREMY PAYNE, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. LINDA COPPLE TROUT, DARRELL G. BOLZ, SARA B. THOMAS, WILLIAM H. WELLMAN, KIMBER RICKS, SEN. CHUCK WINDER, and REP. CHRISTY PERRY, in their official capacities as members of the Idaho State Public Defense Commission,<br><br>Defendants-Respondents | Supreme Court Case No. 43922<br><br>CERTIFICATE OF SERVICE |

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

RICHARD EPPINK

ATTORNEY FOR APPELLANT

BOISE, IDAHO

LAWRENCE G. WASDEN
CALLY YOUNGER
DANIEL J. SKINNER

ATTORNEYS FOR RESPONDENTS

BOISE, IDAHO

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk

Date of Service: MAR 23 2016

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

| | |
|---|---|
| TRACY TUCKER, JASON SHARP, NAOMI MORLEY, JEREMY PAYNE, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>STATE OF IDAHO; C.L. "BUTCH" OTTER, in his official capacity as Governor of Idaho; HON. LINDA COPPLE TROUT, DARRELL G. BOLZ, SARA B. THOMAS, WILLIAM H. WELLMAN, KIMBER RICKS, SEN. CHUCK WINDER, and REP. CHRISTY PERRY, in their official capacities as members of the Idaho State Public Defense Commission,<br><br>Defendants-Respondents | Supreme Court Case No. 43922<br><br>CERTIFICATE TO RECORD |

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 25th day of January, 2016.

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk